

EXHIBIT GGG

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MCDONALD'S CORPORATION,)
Plaintiff,)
vs.) No.)
1:19-cv-06471)
VANDERBILT ATLANTIC) (DLI) (SLT)
HOLDINGS LLC,)
Defendant.)
-----)

REMOTE VIDEOTAPED DEPOSITION OF
MORRIS MISSRY
New York, New York
Thursday, September 30, 2021

Reported By:
CATHI IRISH, RPR, CRR, CLVS

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September 30, 2021

10:10 a.m.

Remote videotaped deposition of
MORRIS MISSRY, with all participants
appearing via videoconference, before
Cathi Irish, a Registered Professional
Reporter, Certified Realtime Reporter,
and Notary Public of the State of
New York.

A P P E A R A N C E S:

PASHMA STEIN WALDER HAYDEN, P.C.

Attorneys for Plaintiff

21 Main Street

Suite 200

Hackensack, New Jersey 07601

BY: BRENDAN M. WALSH, ESQ.

DENISE ALVAREZ, ESQ.

MEISTER SEELIG & FEIN LLP

Attorneys for Defendant

125 Park Avenue

7th Floor

New York, New York 10017

BY: HOWARD S. KOH, ESQ.

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A P P E A R A N C E S: (cont'd)

WACHTEL MISSRY LLP

Attorneys for the Witness

885 Second Avenue

New York, New York 10017

BY: DANI SCHWARTZ, ESQ.

ALSO PRESENT:

JIM ROBERTS, videographer

GRACIE ARAUJO, Veritext concierge

MICHAEL MEYER

STACY HOWARD

1
2 THE VIDEOGRAPHER: Good morning.
3 We're going on the record at
4 approximately 10:10 a.m. on September
5 30, 2021.

6 Please silence any cell phones,
7 computer tones or other electronic
8 devices. Audio and video recording
9 will continue to take place unless all
10 parties agree to go off the record.

11 This is media unit 1 of the
12 recorded deposition of Morris Missry
13 taken by counsel for the plaintiff in
14 McDonald's Corporation versus
15 Vanderbilt Atlantic Holdings LLC filed
16 in the U.S. District Court, Eastern
17 District of New York, case number
18 1:19-cv-06471(DLI)(SLT).

19 My name is Jim Roberts here in
20 association with Veritext New York. I
21 am the videographer. The court
22 reporter is Cathi Irish, also with
23 Veritext.

24 All counsel consent to this
25 remote video arrangement, waive

1
2 objections to this manner of reporting
3 and to the remote swearing in of the
4 witness.

5 Counsel will please state their
6 appearances beginning with noticing
7 counsel.

8 MR. WALSH: Brendan Walsh, Pashma
9 Stein Walder Hayden, on behalf of
10 plaintiff McDonald's Corporation.

11 MS. ALVAREZ: Denise Alvarez,
12 Pashma Stein Walder Hayden, on behalf
13 of McDonald's Corporation.

14 MR. KOH: Howard Koh, Meister
15 Seelig & Fein, on behalf of defendant
16 Vanderbilt Atlantic Holdings LLC.

17 MR. SCHWARTZ: Dani Schwartz,
18 Wachtel Missry LLP, representing the
19 deponent.

20 M O R R I S M I S S R Y, called as a
21 witness, having been duly affirmed by
22 a Notary Public, was examined and
23 testified as follows:

24 ///

25 ///

1

2 EXAMINATION

3 BY MR. WALSH:

4 Q. Good morning, Mr. Missry. How
5 are you today?

6 A. Great. How are you?

7 Q. Good, thanks. You're an attorney
8 and I imagine you've participated in many
9 depositions before so I won't necessarily
10 go through all of the instructions I
11 normally give to attorneys, but especially
12 because we're conducting the deposition
13 today over Zoom, I just ask that you
14 please make sure to let me finish asking
15 my question before you begin your
16 response. It just gets very difficult for
17 the court reporter over this medium to get
18 all of us, even harder than normal.

19 And you're represented by your
20 partner today, Mr. Schwartz?

21 A. Yes.

22 Q. Is there any reason such as
23 medication that would prevent you from
24 understanding my questions or giving
25 complete and accurate answers today?

1 MISSRY

2 A. No.

3 Q. Where are you taking the
4 deposition from today?

5 A. In my office at 885 Second
6 Avenue, 47th floor, New York, New York.

7 Q. Are you in the room alone?

8 A. I am.

9 Q. Okay. Can you describe the
10 screens that are in front of you right now
11 just so I understand what you're looking
12 at?

13 A. I'm looking at a computer screen.

14 Q. Just one screen?

15 A. Yes.

16 Q. Okay. Do you have any programs
17 open other than Zoom and Exhibit Share?

18 A. No.

19 Q. Okay. So you don't have your
20 e-mail program open?

21 A. Let me check. I don't think so.
22 Just Zoom and the Veritext
23 Exhibit Share.

24 Q. Perfect. Okay. And do you
25 understand that you're not allowed to have

1 MISSRY

2 any private communications or chats with
3 anyone while a question is pending?

4 A. Yes.

5 Q. If you need a break for any
6 reason, just let me know and I'm happy to
7 take a break so long as there's not a
8 question pending.

9 MR. SCHWARTZ: And as we
10 discussed yesterday, I'm going to make
11 a quick objection/statement. I just
12 wanted to wait until you were finished
13 with your preliminaries to do that.

14 MR. WALSH: Sure.

15 MR. SCHWARTZ: I don't know
16 whether you are or not. You tell me.

17 MR. WALSH: I'm just about ready.

18 MR. SCHWARTZ: Okay, great.

19 I want to make a quick statement
20 on the record with respect to an issue
21 that I discussed on the phone
22 yesterday with plaintiff's counsel.

23 Mr. Missry, the deponent today, is a

24 non-party to the action. He's

25 represented the defendant in this case

MISSRY

as its attorney on matters relating to the underlying dispute in this action. He's appearing voluntarily today.

He's prepared to testify to the extent that the questions are appropriate and do not seek privileged information.

By appearing and testifying, he does not in any way for himself or for the law firm Wachtel Missry waive or vitiate the attorney/client privilege, work product privilege, common interest privilege, the Kovel doctrine or Kovel privilege or any other applicable privileges. Those privileges can be asserted by both clients and attorneys, and objections can be made by both clients which in this action would be the defendant and attorneys. Questions implicating a privilege are improper and if such questions are asked, we will object and our objections should be deemed a continuing objection to any such questions. But to be clear and

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regardless of an objection, a specific objection placed on the record in response to a specific question, Mr. Missry's testimony should not be deemed to constitute a waiver or vitiation of any privilege.

I'm putting this on the record now even though it's in advance of questioning or substantive questioning simply to avoid cluttering the record, and I understand that I am not claiming that plaintiff's counsel agrees with our position but I'm placing it on the record.

MR. KOH: And on behalf of defendant Vanderbilt Atlantic Holdings LLC, I join in Mr. Schwartz's statement.

MR. WALSH: Okay, to be clear, McDonald's disagrees with much of what was just said. I understand that you may make privileged objections today. I do not agree that an answer to a question does not constitute a waiver.

1 MISSRY

2 We don't agree to any selective waiver
3 of the privilege in this matter. So I
4 just want to make clear that we are
5 not agreeing or stipulating to
6 anything that you just said.

7 BY MR. WALSH:

8 Q. Mr. Missry, have you ever been
9 deposed before?

10 A. I believe so.

11 Q. When was that?

12 A. I really don't recall how long
13 ago it was.

14 Q. Do you remember what type of case
15 it was?

16 A. There was one maybe 25 years ago
17 in a real estate matter and one maybe
18 three, four years ago in another real
19 estate matter.

20 Q. Okay. And how often do you take
21 depositions?

22 A. I generally don't. I'm a real
23 estate attorney.

24 Q. Okay. So have you ever taken a
25 deposition?

1 MISSRY

2 A. In my glorified past as a
3 litigator I have.

4 Q. But it sounds like it's been a
5 long time?

6 A. It's been a long time.

7 Q. Well, if you don't understand any
8 of my questions for any reason just let me
9 know and I'll be happy to try to rephrase
10 it.

11 A. Sure.

12 Q. Have you ever been retained by a
13 party in any litigation or arbitration to
14 serve as an expert?

15 A. I don't believe so.

16 Q. And have you ever been accepted
17 by a court or an arbitration panel to
18 serve as an expert?

19 A. I don't believe so.

20 Q. What, if anything, did you do to
21 prepare for today's deposition?

22 A. I read through some old e-mails.
23 I read the fair market option rider and
24 some correspondence.

25 Q. Did you meet with anyone?

1 MISSRY

2 A. Did I meet with anybody, no, I
3 didn't have any meetings with anybody, no.

4 Q. Did Vanderbilt, anyone at
5 Vanderbilt or Vanderbilt's counsel send
6 you any documents to review?

7 A. Yes.

8 Q. Who sent you documents?

9 A. I think Howard sent us a couple
10 documents.

11 Q. Do you remember what documents
12 those were?

13 A. Some e-mails, the option rider,
14 maybe the letter agreement that was signed
15 between the parties when we were talking
16 about retaining the third arbitrator --
17 third appraiser, sorry.

18 Q. Do you recall approximately how
19 many documents they sent you?

20 A. I think there were five or six
21 attachments.

22 Q. Were those documents, did they
23 contain exhibit tabs on them?

24 A. I'm not sure.

25 Q. Did you have any conversations

1 MISSRY

2 with anyone at Vanderbilt or Vanderbilt's
3 counsel in advance of your deposition
4 today?

5 A. Yes.

6 Q. When was the last time you spoke
7 with them?

8 A. I think we had a conversation
9 with Howard and his partner, Stephen,
10 what, today's Thursday, I think Monday.
11 Monday or last week, I'm not sure.

12 Q. What did you discuss during that
13 meeting?

14 MR. SCHWARTZ: I'm going to
15 object to that on the grounds of
16 common interest privilege.

17 MR. WALSH: Can you explain what
18 the common interest is?

19 MR. SCHWARTZ: I think it's
20 self-evident that the witness has
21 acted as an attorney for the
22 defendant. I'm objecting but the
23 witness can answer if the witness
24 knows -- has a responsive answer.

25 THE WITNESS: Should I answer?

1 MISSRY

2 MR. SCHWARTZ: You can answer if
3 you understood the question and have
4 an answer to give.

5 THE WITNESS: Brendan, can you
6 ask the question again?

7 BY MR. WALSH:

8 Q. You said that you had a
9 conversation with Howard Koh and his
10 partner at Meister on Monday you thought?

11 A. Yeah, the conversation.

12 Q. I was asking what you discussed
13 during that meeting or that conversation.

14 A. Howard and Stephen mentioned that
15 you may be asking a question about the 936
16 case. It was pretty much about that.
17 There may have been one other thing but I
18 just don't recall what it was.

19 Q. How long did the conversation
20 last?

21 A. 10 minutes.

22 Q. So all you recall about that
23 conversation is that they said I may ask
24 questions about the 936 Second Avenue
25 case?

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A. There was probably another thing that they mentioned but I don't -- just off the top of my head I don't recall.

Q. Did you have any conversations with anyone at Vanderbilt, say within the last month or so?

A. Yes.

Q. Who have you spoken with?

A. Sam Rottenberg.

Q. Are you currently representing Vanderbilt Atlantic Holdings?

A. Since McDonald's commenced the litigation, we haven't done anything for them.

Q. Okay. So you're not currently representing Vanderbilt?

A. I'm not currently doing any work.
I still have an open retainer.

Q. So what did you discuss with Mr. Rottenberg last time you spoke?

A. The last time we spoke I called him to see how he was doing. He was very ill and I immediately hung up the phone and wished him a speedy recovery.

1 MISSRY

2 Q. You didn't discuss anything
3 substantive about this case?

4 A. No.

5 Q. When was the last time you spoke
6 with Tom Li?

7 A. Tom Li from Sam's office? Not --
8 not since -- I would say probably when
9 you -- when McDonald's commenced the
10 litigation, we may have spoken then but
11 before then, during the course of the
12 discussions we were having with McDonald's
13 in September of '19, I guess it was.

14 Q. Have you reviewed the transcripts
15 of any of the depositions that have
16 previously been conducted in this matter?

17 A. No.

18 Q. Did anyone send you those
19 transcripts?

20 A. I don't recall.

21 Q. Okay. Approximately how many
22 times in the past year have you spoken
23 with an attorney from Meister Seelig &
24 Fein about Vanderbilt or the dispute
25 between McDonald's and Vanderbilt?

1 MISSRY

2 A. Not very often. Very few times.

3 Q. And who have you spoken with when
4 you've spoken to them?

5 A. Howard or Stephen.

6 Q. And do you recall what the
7 purpose of those discussions were?

8 A. I really don't recall having
9 anything substantive to discuss with them
10 except, you know, in the outset or at the
11 outset of the litigation.

12 Q. Okay. Did Vanderbilt or its
13 attorneys ever tell you or your law firm
14 to retain all documents that are
15 potentially relevant to this dispute?

16 A. Probably.

17 Q. Do you recall when?

18 A. I would assume it would have been
19 at the outset of the case but I don't
20 recall.

21 Q. Okay. Before you had that
22 discussion -- was it a discussion or was
23 it in writing, you just don't remember?

24 A. I don't recall.

25 Q. Before that communication, had

1 MISSRY

2 you destroyed or discarded any documents
3 relevant to this litigation?

4 A. No, I don't make a habit of
5 discarding or shredding any documents.

6 Q. So you graduated from Cardozo Law
7 School; right?

8 A. I did.

9 Q. What year?

10 A. 1990.

11 Q. When were you admitted to the
12 New York Bar?

13 A. 1991.

14 Q. Are you admitted anywhere else?

15 A. No.

16 Q. And before you graduated from
17 Cardozo you graduated from the University
18 of Maryland; is that right?

19 A. Yes.

20 Q. What year did you graduate from
21 Maryland?

22 A. 1986.

23 Q. What was your degree in?

24 A. Communications.

25 Q. Any minors?

1 MISSRY

2 A. No.

3 Q. What did you do in the period
4 between graduating from college and law
5 school?

6 A. I graduated December 1986. In
7 January 1986, my father was diagnosed with
8 lung cancer and had surgery in March of
9 19 -- sorry, 1987, January '87, March '87
10 and I worked in his business while he was
11 recovering until law school started in
12 August.

13 Q. What kind of business?

14 A. My father manufactured blank
15 videotapes at the time.

16 Q. Other than serving as a lawyer,
17 do you hold any other professional
18 licenses?

19 A. I have a broker's license, a real
20 estate brokerage license.

21 Q. Is that active?

22 A. I believe so.

23 Q. Do you recall when you became a
24 licensed real estate broker?

25 A. No.

1 MISSRY

2 Q. And is that something that you
3 actively use or is it something that you
4 obtained years ago and just like to keep
5 active?

6 A. The latter.

7 Q. Okay. Are you a member of any
8 entities other than Wachtel Missry?

9 A. Yes.

10 Q. Okay. What types of entities are
11 they?

12 A. I have a lot of passive
13 investments, a lot of active real estate
14 investments, an active luxury products
15 company.

16 Q. What is the luxury products
17 company?

18 A. What do you mean what is it?

19 Q. What is the name of it?

20 A. Icon Trade Services LLC.

21 Q. What does Icon Trade Services do?

22 A. Icon Trade Services imports
23 luxury products and resells them in the
24 United States.

25 Q. Do you know if any of the

1 MISSRY

2 entities that you are a member of are a
3 party to a ground lease?

4 A. A ground lease? It's a very
5 specific question, no.

6 Q. Have you ever been a principal or
7 member of an entity that's a party to a
8 ground lease?

9 A. I've been a principal or a member
10 of an entity that has been parties to net
11 leases. Ground leases -- ground leases
12 are typically leases that people sign to
13 develop property.

14 Q. And net leases that you're
15 referring to, were those for property as
16 well? I'm just trying to understand what
17 the distinction --

18 A. Yes.

19 Q. Were you a founding partner of
20 Wachtel Missry?

21 A. No.

22 Q. But you're currently the managing
23 partner of the firm; right?

24 A. I am.

25 Q. And you're the chair of the

1 MISSRY

2 firm's real estate department; right?

3 A. I am.

4 Q. Approximately how many lawyers
5 are in your firm's real estate department?

6 A. We combine our real estate and
7 corporate departments because our
8 corporate departments service our real
9 estate departments so I would say without
10 counting, 25 or 26.

11 Q. Is it the biggest department in
12 the firm?

13 A. It is.

14 Q. The firm bio states that you've
15 been representing clients in real estate
16 matters throughout the word for the past
17 three decades. Did you begin practicing
18 real estate law right out of law school in
19 1990?

20 A. Yes.

21 Q. Where did you begin practicing?

22 A. At a firm called Mishaan Dayon &
23 Zalta.

24 Q. How long were you there?

25 A. I was there until the end of '94.

1 MISSRY

2 Q. And you practiced real estate law
3 while you were there?

4 A. Amongst other things, yes.

5 Q. When did you join what is now
6 Wachtel Missry?

7 A. The end of '94, beginning of '95.

8 Q. Have you ever represented a
9 client in a negotiation of a ground lease
10 that contains a fair market rental value
11 provision in it?

12 A. Yes.

13 Q. Approximately how many times?

14 A. I've been doing this for a very
15 long time, Mr. Walsh. I can't tell you.
16 I've done hundreds, if not more leases in
17 my career with a lot of fair market value
18 provisions.

19 Q. Have you ever represented a
20 client in connection with a fair market
21 rent valuation process like occurred here
22 under a ground lease before you
23 represented Vanderbilt Atlantic Holdings?

24 A. Can you repeat that?

25 Q. Have you ever represented a

1 MISSRY

2 client in connection with a fair market
3 rent valuation process under a ground
4 lease before you represented Vanderbilt
5 Atlantic Holdings in this matter?

6 A. Probably but I can't recall which
7 ones.

8 Q. Do you recall approximately how
9 many times?

10 A. I don't.

11 Q. But this was not the first time;
12 correct?

13 A. No.

14 Q. Do you recall if the New York
15 Court of Appeals, its 2008 decision in
16 936 Second Avenue LLP versus Second
17 Corporate Development Company ever came up
18 in any of those prior representations?

19 A. I don't believe so.

20 Q. And how about the New York Court
21 of Appeals 1996 decision in New York
22 Overnight Partners v. Gordon?

23 A. I don't know.

24 Q. Are you familiar with those
25 cases?

1 MISSRY

2 A. I'm familiar with the 936 case as
3 a result of this particular process.

4 Q. Before this case, had you ever
5 come across that case before?

6 A. As I just said, I don't recall.

7 Q. What is your understanding of
8 what the 936 Second Avenue case stands for
9 or the rule announced in that case?

10 A. My understanding is that absent a
11 provision in the lease, in a net lease in
12 particular, that says you don't have to
13 take the net lease into account, you take
14 the net lease into account.

15 Q. Do you recall when you became
16 aware of that rule, even if it wasn't from
17 that specific case?

18 A. I believe Tom Tener brought it to
19 my attention sometime in 2019 after we had
20 retained him, as part of I guess his
21 retention, he brought it up to me.

22 Q. Now earlier you said you've
23 negotiated a lot of ground leases and net
24 leases over the course of your career.
25 You were not aware of that rule before Tom

1 MISSRY

2 Tener brought it to your attention?

3 A. Not really.

4 Q. Do you recall -- would you agree
5 that the 936 Second Avenue case and the
6 rule you just described would implicate
7 the way a ground lease would be negotiated
8 though; right?

9 MR. KOH: Objection. You may
10 answer.

11 THE WITNESS: Can you repeat
12 that?

13 BY MR. WALSH:

14 Q. Yeah, would you agree that --
15 I'll rephrase it.

16 Would you agree that noting the
17 rule described in 936 Second Avenue would
18 be important in negotiating a ground lease
19 that contains a fair market rent valuation
20 provision?

21 MR. KOH: Same objection. The
22 witness may answer.

23 THE WITNESS: When we negotiate
24 fair market value provisions, we
25 typically negotiate really clear

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provisions that give the attorneys or
whomever is looking at those
provisions at the particular point in
time clear guideposts, if you will,
guide rails, and so in a typical
provision, we would negotiate a lot of
different things. I don't necessarily
think we need to put in -- we would
have needed to be aware of that
provision in any particular ground
lease or net lease or regular space
lease because of the guide rails we
typically negotiate.

BY MR. WALSH:

Q. So what you're saying is that
typically you would make clear one way or
the other whether encumbrances should or
should not be included in the valuation?

A. Yes.

Q. Has that always been your
practice for your -- for as long as you've
been practicing real estate law?

A. Whenever I've negotiated these
provisions, yes.

1 MISSRY

2 Q. When did you begin representing
3 Vanderbilt Atlantic Holdings?

4 A. I think at the beginning of 2019.

5 Q. So Vanderbilt produced a
6 privilege log in this matter and the first
7 date your name appears in the log is on
8 January 22, 2019, so that sounds about
9 consistent with your recollection?

10 A. Sounds right.

11 Q. Okay. How did you come to
12 represent Vanderbilt?

13 A. Sam Rottenberg called me.

14 Q. And have you worked with Sam
15 Rottenberg in the past?

16 A. Sam was involved in a matter,
17 very, very -- a very long time ago with a
18 friend of mine and so I got to know him
19 during that matter. I don't think I was
20 ever retained on that matter but we had
21 several conversations.

22 Q. Was Sam Rottenberg your primary
23 point of contact while you were
24 representing Vanderbilt?

25 A. Yes.

1 MISSRY

2 Q. Who else did you work with at
3 Vanderbilt on this matter?

4 A. Well, Tom Li was involved in
5 providing information and sort of helping
6 Sam with information flow, et cetera, but
7 I basically spoke to Sam.

8 Q. So did you report to Sam in
9 connection with this matter?

10 A. Yes.

11 Q. Okay. And was Sam responsible
12 for making decisions in this matter?

13 A. He was the client so we would
14 discuss a matter and ultimately every --
15 you know, all clients make the final
16 decisions.

17 Q. Did you work with any other
18 lawyers in connection with your
19 representation of Vanderbilt?

20 A. In my firm?

21 Q. Your firm or other firms.

22 A. Michael Meyer from McDonald's was
23 my counterparty.

24 Q. How about lawyers who were also
25 working on behalf of Vanderbilt?

1 MISSRY

2 A. I don't believe there were any
3 other law firms involved.

4 Q. Do you know who represented
5 Vanderbilt before they retained you?

6 A. No.

7 Q. You never interacted with prior
8 counsel in this matter?

9 A. No.

10 Q. Have you ever been represented
11 Sam Rottenberg personally?

12 A. No.

13 Q. Have you ever represented the
14 Rabsky Group?

15 A. No.

16 Q. Are you familiar with the Rabsky
17 Group?

18 A. I've heard of them, I've read
19 articles about them. I know Sam does work
20 with them. I don't know what their
21 relationship is but just anecdotal.

22 Q. Did you know that the Rabsky
23 Group is involved in this matter?

24 MR. KOH: Objection. Go ahead.

25 THE WITNESS: No.

1 MISSRY

2 BY MR. WALSH:

3 Q. Do you know who the members of
4 840 Atlantic -- sorry, do you know who the
5 members of Vanderbilt Atlantic Holdings
6 were when you were representing them?

7 A. I don't recall. I thought it was
8 Sam.

9 Q. Did you ever deal with a man
10 named Simon Dushinsky in connection with
11 this matter?

12 A. No.

13 Q. Do you know who he is?

14 A. No.

15 Q. Are you familiar with an entity
16 called 840 Atlantic LLC?

17 A. If that's the name of the
18 property owner then I would be.

19 Q. But you don't know if that's the
20 name of the property owner?

21 A. I would have to take a look at my
22 notes.

23 Q. How about 840 Atlantic Holdings
24 LLC?

25 A. Same answer.

1 MISSRY

2 Q. MMB Associates LLC?

3 A. I'm not sure.

4 Q. How about Anthony Musto?

5 A. I don't know who he is.

6 Q. Did Vanderbilt Atlantic Holdings
7 pay your firm's bills in this matter?

8 A. Did Vanderbilt pay?

9 Q. Correct.

10 A. Yes.

11 Q. So Vanderbilt Atlantic Holdings
12 was responsible for your bills and paid
13 your bills?

14 A. I don't recall who actually made
15 the payments but we would bill the client,
16 then we would get paid.

17 Q. And you testified earlier that
18 Sam Rottenberg was the person at
19 Vanderbilt who had final authority to make
20 decisions on behalf of Vanderbilt; is that
21 right?

22 MR. SCHWARTZ: Objection.

23 MR. KOH: Same objection. Go
24 ahead.

25 THE WITNESS: Sam was the person

1 MISSRY

2 that I was dealing with who I believed
3 was the owner of Vanderbilt and whom I
4 took direction from.

5 BY MR. WALSH:

6 Q. Did you have authority to make
7 decisions on behalf of Vanderbilt without
8 getting approval from Mr. Rottenberg?

9 A. I'm an advisor, not a decider.

10 Q. Do you expect to be paid by
11 Vanderbilt or anyone else for the time
12 spent preparing for this deposition or for
13 sitting for this deposition today?

14 A. If we're legally allowed to be
15 paid, I would have no problem being paid.
16 I don't know what's appropriate but I'm
17 not -- I was not induced or promised
18 anything to appear today.

19 Q. Do you intend to bill Vanderbilt
20 or anybody else for your time today?

21 A. I haven't thought about it.

22 MR. WALSH: If we could, Gracie,
23 please pull up P69.

24 THE WITNESS: Should I go look at
25 the --

1 MISSRY

2 BY MR. WALSH:

3 Q. It should be in the marked
4 exhibits folder. If you click on it, you
5 should be able to pull it up. It is the
6 lease dated March 18, 1998 between Anthony
7 Musto and McDonald's Corporation for the
8 property located at 840 Atlantic Avenue in
9 Brooklyn with its amendments and
10 supplements. Do you have it pulled up?

11 A. I do.

12 Q. Okay.

13 Have you reviewed the full
14 McDonald's lease before?

15 A. I did back when I was retained,
16 yes.

17 Q. And was the first time you
18 reviewed it when you were retained in
19 January 2019?

20 A. It would have been either then or
21 right after we were retained.

22 Q. Okay. So you were not familiar
23 with this lease before you were retained?

24 A. No.

25 Q. Were you familiar with the

1 MISSRY

2 property at 840 Atlantic Avenue?

3 A. No.

4 Q. For what purpose were you
5 retained by Vanderbilt Atlantic Holdings?

6 A. To deal with the option exercised
7 by McDonald's in the determination of the
8 fair market rent in connection with that
9 exercise.

10 Q. And what did you understand the
11 goal of that fair market rent valuation
12 exercise to be?

13 A. The goal was to determine what
14 the fair market rent was in accordance
15 with the lease.

16 Q. Are you aware that Vanderbilt has
17 been seeking a rezoning of the property
18 since shortly after it acquired its
19 99-year ground lease in November 2017?

20 MR. SCHWARTZ: Objection. The
21 witness can answer.

22 THE WITNESS: I was made aware of
23 it after I was retained.

24 BY MR. WALSH:

25 Q. Okay. And what did you know

1 MISSRY

2 about Vanderbilt's plans for the property
3 when you were retained?

4 A. I was focused on this particular
5 assignment. I'm not a zoning attorney.
6 It may have been mentioned to me but I
7 really wasn't focused in on it. I don't
8 know what their plans were but I believe
9 they had -- or they -- if the zoning
10 change went through, they would have an
11 ability to get more density on the
12 property but again, this is anecdotal.

13 Q. So you were not representing
14 Vanderbilt in connection with its
15 redevelopment plans or its efforts to
16 obtain a rezoning of the property?

17 A. No, only with respect to the
18 determination of the fair market rental
19 value of the property.

20 Q. Have you ever had discussions
21 with anyone about how Vanderbilt could use
22 the fair market rent valuation process in
23 the lease to get McDonald's off of the
24 property?

25 A. It's not possible.

1 MISSRY

2 Q. Why do you say it's not possible?

3 A. Because there's no termination
4 option in the lease in my understanding.

5 Q. So have you ever had discussions
6 with anyone about trying to use that
7 process to get a higher rent than
8 McDonald's may be willing to pay in order
9 to constructively remove them from the
10 property?

11 MR. KOH: Objection. Go ahead.

12 THE WITNESS: Again, the focus of
13 my retention was to deal with a fair
14 market rental value determination.
15 How that would impact the party is not
16 my -- it's not in my particular domain
17 or interest.

18 BY MR. WALSH:

19 Q. Did you ever have discussions
20 with anyone about how this process could
21 be used to get the highest possible
22 estimate of fair market rent?

23 A. I don't think I'd be going out on
24 a limb by stating that landlords typically
25 want the highest rent possible and tenants

1 MISSRY

2 want the lowest rent possible. You hope
3 that they meet somewhere and resolve it
4 before it goes to an arbitration or some
5 process. This was a very interesting
6 lease. It didn't have a process other
7 than for appraisers to submit their
8 opinions and then to compare them and
9 average them.

10 Q. So was your goal in advising
11 Vanderbilt to arrive at the most accurate
12 estimate of the fair market rent valuation
13 or the highest possible estimate?

14 MR. KOH: Objection. The witness
15 may answer.

16 THE WITNESS: My goal was to
17 advise my client on the process and
18 the interpretation of the particular
19 lease clause. I don't have any skin
20 in the game in terms of the highest
21 rent, the lowest rent, the average
22 rent. It's not relevant to me.

23 BY MR. WALSH:

24 Q. Did you have conversations with
25 anyone about methods to obtain a higher

1 MISSRY

2 fair market rent valuation from an
3 appraiser?

4 A. The appraiser's job is to
5 appraise and determine the value of the
6 property and I believe that based upon
7 that appraisal or appraised value, you
8 then determine the rent but that's not --
9 again, that's not in my domain. That's
10 the appraiser's job.

11 Q. But appraisers need to be given
12 instructions on how to appraise the
13 property; right?

14 A. Not if the lease clause sets
15 forth the process and the criteria.

16 Q. We'll get to that in a little
17 bit.

18 MR. WALSH: If we could pull up
19 P15, please. This is a May 10, 2018
20 letter from Vanderbilt Atlantic
21 Holdings to McDonald's Corporation.

22 THE WITNESS: Will that pop up
23 also here? So here I just see the
24 P69.

25 MR. WALSH: You may just need to

1 MISSRY

2 click on the marked exhibits folder
3 again and it should pop up in there.

4 MR. KOH: Or just refresh your
5 screen.

6 THE WITNESS: Got it.

7 BY MR. WALSH:

8 Q. Have you seen this letter before?

9 A. I believe I did.

10 Q. Do you recall when you first saw
11 this letter?

12 A. No.

13 Q. Okay. And because it's dated May
14 2018, you were not involved in the
15 preparation of this letter; is that right?

16 A. That's correct.

17 Q. And the client did not consult
18 with you in advance of sending that
19 letter?

20 A. He did not.

21 Q. Do you have any knowledge of the
22 information that was used to prepare that
23 letter?

24 A. I don't.

25 Q. Do you have any involvement in

1 MISSRY

2 Vanderbilt's retention of BBG in 2018?

3 A. No.

4 Q. Do you have an understanding of
5 what BBG was retained to do in 2018?

6 MR. KOH: Objection. Go ahead.

7 THE WITNESS: I don't know.

8 Maybe do an appraisal. I don't know.

9 I wasn't involved until 2019 with
10 Vanderbilt.

11 BY MR. WALSH:

12 Q. Okay, so then you were also not
13 involved in Vanderbilt's retention of Tom
14 Tener in 2018; is that right?

15 A. In 2018, no.

16 Q. And just to be clear, did you
17 have any involvement with Vanderbilt
18 Atlantic Holdings or 840 Atlantic Avenue
19 before January of 2019?

20 A. No.

21 Q. Vanderbilt Atlantic Holdings
22 retained Republic Valuations in January
23 2019. Were you involved at all with the
24 work that Vanderbilt was doing with
25 Republic Valuations?

1 MISSRY

2 A. The name doesn't sound familiar.
3 I dealt with a few appraisers. I don't
4 recall Republic. If you give me names of
5 people, that would be helpful.

6 Q. How about Esty Cohen?

7 A. No.

8 Q. Are you familiar with
9 Metropolitan Valuation Services?

10 A. The name sounds familiar.

11 Q. David Lyon?

12 A. Yes.

13 Q. Okay. And what do you know about
14 David Lyon and Metropolitan Valuation
15 Services?

16 A. I believe that we retained or Sam
17 retained David to look at an appraisal or
18 two that had been done previously because
19 David had come recommended from somebody.
20 I don't recall who. I think he did some
21 type of review.

22 Q. Okay, but he was or Metropolitan
23 was retained by Vanderbilt and not your
24 firm; correct?

25 A. I don't recall.

1 MISSRY

2 MR. WALSH: Gracie, if you can
3 please mark the document Bates stamped
4 VA 012072.

5 (Exhibit P92, document Bates
6 labeled VA 012072, marked for
7 identification.)

8 BY MR. WALSH:

9 Q. This document runs through the
10 Bates stamp VA 012079. It's an e-mail
11 chain beginning with what appears to be a
12 calendar invite for February 6, 2019 and
13 ending with an e-mail on February 15,
14 2019.

15 A. I don't see it here.

16 MR. KOH: Gracie, can you let us
17 know when it's uploaded?

18 VERITEXT CONCIERGE: Yes, it's
19 taking a second.

20 THE WITNESS: Where do you press
21 to refresh this file thing?

22 MR. KOH: Just go up to the
23 browser bar with the Web address and
24 hit return on it and it should be --
25 it's available now.

1 MISSRY

2 VERITEXT CONCIERGE: Yes.

3 BY MR. WALSH:

4 Q. Do you see --

5 A. It's loading. I have it here,
6 okay.

7 Q. Okay. If you could just take a
8 moment to review this document and let me
9 know when you're ready to discuss it.
10 It's now been marked as Exhibit P92.

11 A. (Witness perusing document.)
12 Okay.

13 Q. Okay, if you could turn to the
14 page ending with Bates number 077.

15 A. Okay.

16 Q. It should be the sixth page. It
17 looks like David Lyon sent you a calendar
18 invite on February 6, 2019 for a call that
19 same day.

20 Do you see that?

21 A. I do.

22 Q. Do you recall why you spoke with
23 David that day?

24 A. I assume it was to discuss his
25 retention.

1 MISSRY

2 Q. And what specifically about his
3 retention, do you recall?

4 A. Other than looking at these
5 e-mails, no.

6 Q. So you don't remember anything
7 about a phone call that you had with David
8 Lyon in early February 2019?

9 A. On that date, no.

10 Q. Do you know if Sam Rottenberg or
11 anyone else from Vanderbilt would have
12 also participated in that call?

13 A. Possibly. Probably.

14 Q. Why do you say probably?

15 A. Because it looks based upon -- I
16 don't actually -- that was a meeting in my
17 office. I don't know.

18 Q. And in this e-mail chain, it
19 discusses a meeting, looks like probably
20 the following week, February 12th at
21 1:30 p.m. in your office. Do you recall
22 that meeting?

23 A. I see it referenced here. I see
24 it referenced here. I don't recall the
25 actual meeting from a couple years ago,

1 MISSRY

2 no.

3 Q. And do you know who participated
4 in that meeting?

5 A. I don't recall.

6 Q. I know we're talking about two
7 and a half years ago.

8 A. Yeah, I'm sorry, I don't mean to
9 be -- I just -- I want to give you
10 accurate answers. I don't recall who was
11 there.

12 Q. Is it your practice to take notes
13 during meetings like this with an
14 appraiser?

15 A. Sometimes.

16 MR. KOH: I'll object to that
17 question but he's answered. Go ahead.

18 BY MR. WALSH:

19 Q. Do you recall if you took notes
20 for this meeting?

21 A. I don't have any recollection.

22 Q. And do you recall what Vanderbilt
23 asked Metropolitan to do?

24 A. Other than what's in this e-mail
25 and the proposal, no.

1 MISSRY

2 MR. WALSH: Okay. Now if we
3 could pull up what's previously marked
4 as P24.

5 THE WITNESS: If someone can just
6 let me know when something is posted,
7 it would be helpful.

8 BY MR. WALSH:

9 Q. I see it on my screen now. I
10 find if I just click that marked exhibits
11 folder, it seems to be a little faster for
12 me than refreshing the whole screen.

13 A. Which one?

14 Q. P24.

15 A. Okay. I have it up here.

16 Q. This is a document Bates stamped
17 VA 011918 through 924. It's a --

18 A. I see it.

19 Q. Okay. What is this document?

20 A. It looks like a proposal to do
21 some work for Vanderbilt Atlantic
22 Holdings.

23 Q. Does this refresh your
24 recollection about what Metropolitan
25 Valuation Services was retained by

1 MISSRY

2 Vanderbilt to do?

3 A. Yes.

4 Q. And what was Metropolitan
5 Valuation Services retained by Vanderbilt
6 to do?

7 A. They were going to review the
8 reports, I guess the appraisals performed
9 by KTR and BBG, and there's a list of
10 things that they were going to be doing on
11 19 of the Bates stamp.

12 Q. Was this work being requested in
13 connection with the fair market rent
14 valuation process under the McDonald's
15 lease?

16 MR. KOH: Objection. The witness
17 may answer.

18 THE WITNESS: I'm sure it was
19 done in preparation for a process.

20 BY MR. WALSH:

21 Q. Would that process have been the
22 fair market valuation process under the
23 McDonald's lease?

24 MR. KOH: Objection. You may
25 answer.

1 MISSRY

2 THE WITNESS: It wasn't part of
3 that process. It was preparatory
4 work.

5 BY MR. WALSH:

6 Q. But preparatory work for that
7 process; right?

8 A. Yes.

9 MR. KOH: Same objection but it's
10 fine, he answered.

11 BY MR. WALSH:

12 Q. And the scope of your
13 representation was only related to that
14 fair market rent valuation process; is
15 that right?

16 A. Correct.

17 Q. Now, the third bullet point down
18 it says, "The reviewer will check for
19 mathematical accuracy and appropriate
20 methodology used in the reports."

21 Do you see that?

22 A. Yes.

23 Q. Do you know if Metropolitan was
24 given a copy of the McDonald's lease?

25 A. I don't know.

1 MISSRY

2 Q. Would it have been important for
3 Metropolitan to have been given a copy of
4 the lease in order to understand the
5 appropriate methodology to be used in the
6 reports?

7 MR. KOH: Objection. The witness
8 may answer.

9 THE WITNESS: I don't think
10 Metropolitan was doing an appraisal of
11 the property. I think they were just
12 doing a desk review of the already
13 performed two appraisals that were
14 done apparently I guess in 2018, you
15 mentioned?

16 BY MR. WALSH:

17 Q. Correct.

18 A. So not necessarily.

19 Q. Do you know if those two
20 appraisals, specifically the KTR appraisal
21 and the BBG appraisal that are referenced
22 in P24, were those prepared also in
23 preparation for the fair market rent
24 valuation process under the McDonald's
25 lease?

1 MISSRY

2 A. I have no idea.

3 Q. Did you give any directions to
4 Metropolitan Valuation Services in
5 connection with the work they were doing
6 for Vanderbilt at this time?

7 A. What does direction mean? I'm
8 not understanding the question.

9 Q. So did you -- let me ask it this
10 way. Did you interact at all with
11 Metropolitan insofar as the specific work
12 it was being asked to do?

13 A. We spoke with David, we met with
14 David. I don't give direction to
15 appraisers or folks like this because it's
16 just not my expertise. So direction,
17 other than telling him we want a desk
18 review or asking him what services he
19 could provide, no.

20 Q. And you're not aware if he was
21 given a copy of the McDonald's lease?

22 A. I don't recall.

23 Q. Do you know who initially reached
24 out to Metropolitan from Vanderbilt?

25 A. I don't recall. It could have

1 MISSRY

2 been me, I just don't remember.

3 MR. WALSH: Okay, if we could
4 please pull up what's been previously
5 marked as P25.

6 BY MR. WALSH:

7 Q. It should be available. This is
8 an e-mail with a lengthy attachment that
9 spans from VA 012456 to 012483. If you
10 could just take a moment and look at the
11 document and let me know when you're ready
12 for some questions and I'll direct you to
13 specific parts I'd like to speak with you
14 about.

15 A. Okay.

16 Q. So the e-mails on the first two
17 pages reference a meeting that happened on
18 February 12th and on the second page of
19 this document, Sam Rottenberg says, it was
20 a pleasure to personally get to meet with
21 you yesterday. And then on the bottom of
22 the first page, David Lyon responded on
23 February 13th saying likewise Sam, it was
24 a pleasure meeting you both.

25 So does that refresh your

1 MISSRY

2 recollection who would have been at that
3 meeting with Metropolitan on February 12,
4 2019?

5 A. It seems as though it was me, Sam
6 and David. I don't know if Tom was there
7 but he could have been. Tom usually
8 accompanied Sam to meetings so he could
9 have been there. I just don't recall.

10 Q. And on February 26, 2019, David
11 Lyon from Metropolitan Valuation Services
12 sent you, Sam Rottenberg and Tom Li
13 Metropolitan's review of the KTR appraisal
14 report.

15 Do you see that?

16 A. I see the e-mail. I'm looking at
17 the February 26th e-mail, yeah.

18 Q. Okay. And attached to this
19 e-mail is the report itself. Do you see
20 that? It starts beginning at 464.

21 A. I see the report.

22 Q. Okay. Did you review this report
23 when David sent it to you?

24 A. I'm sure I did.

25 Q. Do you know if you reviewed a

1 MISSRY

2 draft of the report before David Lyon
3 circulated it on February 26, 2019?

4 A. I don't recall.

5 Q. And when you said you are sure
6 you did, why are you so sure that you did
7 read this report when it came in?

8 A. Because he sent it to me in an
9 e-mail and we retained him for the
10 purposes of reviewing the two appraisals
11 so I'm assuming that I reviewed the
12 report.

13 Q. On the first page of that
14 document in David Lyon's cover e-mail, he
15 wrote, "If I remember correctly, the issue
16 of the ground rent re-set was
17 intentionally not part of the initial
18 engagement for either KTR or BBG."

19 Do you see that?

20 A. I do.

21 Q. Do you know if that was correct
22 or not, that it was intentionally not part
23 of their initial engagement?

24 A. I wasn't involved with this
25 process or with this property in '18 so I

1 MISSRY

2 don ' t know .

3 Q. Did you ever come to learn
4 whether that was true or not?

5 A. I don't know.

6 Q. Okay. The next sentence he says,
7 "In that regard, it would be my opinion
8 that both of the appraisal reports (or one
9 or the other depending on your decision to
10 use either, or both in your preliminary
11 negotiations with McDonald's, or if you
12 are prepared to exchange either or both as
13 per the ground lease re-set schedule)
14 would need to be updated to a current date
15 of value and additional market data would
16 need to be reviewed/included."

17	Do you see that?
----	------------------

18 A. Yes .

19 Q. So does this refresh your
20 recollection about whether you had
21 discussions with David Lyon about the
22 McDonald's lease?

23 A. To give you some context here,
24 Brendan, we were reviewing and speaking to
25 different appraisers for the purpose of

MISSRY

engaging in the process. So David was one of the folks that we were interviewing and we asked him to do this review to get his thoughts and to try to ascertain his expertise, his credibility, et cetera.

Q. A couple lines down at the bottom of that second full paragraph, he wrote, "In general, appraisals prepared for litigation (or something similarly scrutinized) will include a higher degree of support and/or facts and figures and supportive data."

Did you discuss with David this matter potentially going into litigation?

A. There's no process for going into litigation or arbitration as other fair market value provisions contemplate so I don't know why I would.

Q. Okay. And what do you mean by that there's no process for going into litigation or arbitration as other fair market value provisions contemplate?

A. So the provision in question provides that two appraisers come up with

1 MISSRY

2 their valuations, if you will, and I think
3 if they are more than 15 percent
4 different, the two appraisers hire a
5 third, the third gives his or her opinion
6 of value and then they average the three
7 together. So that process is devoid of
8 any judicial or extrajudicial type
9 procedure. So that's what I mean by that.

10 Q. Do you know what or how did you
11 understand when David said that appraisals
12 prepared for litigation or something
13 similarly scrutinized, what did you
14 understand that to be referring to?

15 A. I can't tell you what he meant.

16 Q. Well, how did you understand it?

17 A. How do I understand it now or how
18 did I understand it then?

19 Q. Either.

20 A. Well, I can tell you how I
21 interpret it now but I don't think that's
22 appropriate. Similarly scrutinize. There
23 is no litigation so when we do appraisals,
24 I'm assuming he means that both sides are
25 going to scrutinize the other side's

1 MISSRY

2 appraisals to the extent that they have
3 that ability to. I assume that's what he
4 meant.

5 Q. But you don't remember having any
6 conversations with him about that?

7 A. I don't recall, no.

8 Q. If we can now turn to his review
9 of the KTR report.

10 A. What page is that?

11 Q. It's the page ending in 464. It
12 starts with that letter dated February 26,
13 2019.

14 A. Okay.

15 Q. The evidence in this case shows
16 that KTR prepared and provided a report to
17 Vanderbilt in August of 2018 but then
18 issued a revised report to Vanderbilt in
19 January of 2019. Do you know why KTR
20 produced a revised report in January 2019?

21 MR. KOH: Objection. You may
22 answer.

23 THE WITNESS: Is that the same --
24 I know that we retained KTR to issue a
25 letter of opinion of value. I didn't

1 MISSRY

2 think it was in January.

3 BY MR. WALSH:

4 Q. Right. So I believe you're
5 referring to there was a report that was
6 issued to you in April of 2019 and then
7 another one in July 2019.

8 A. Right.

9 Q. KTR produced a revised report in
10 January 2019. Do you have any knowledge
11 about that?

12 A. I don't. I may have seen it
13 subsequent to my retention but I don't
14 recall.

15 Q. Okay, if you can turn to the next
16 page at the bottom.

17 A. Okay.

18 Q. It talks about some hypothetical
19 conditions and extraordinary assumptions
20 that KTR made in the report that was being
21 reviewed and that included that the
22 property would be rezoned under the
23 M-Crown proposal. That's at the bottom of
24 465 and spilling out to 466.

25 Do you see that?

1 MISSRY

2 A. Yes.

3 Q. And the bottom of 466,
4 Metropolitan wrote, "As the proposed
5 re-zoning initiative has not yet been
6 approved, it is our opinion this valuation
7 scenario is highly speculative as of both
8 the effective date of value, and the date
9 of the report."

10 Do you recall what that -- what,
11 if anything, that meant to you when you
12 read it?

13 A. Again, I can read it now and tell
14 you what I think it means but at the time,
15 I don't recall.

16 Q. And do you recall if you shared
17 this conclusion with KTR?

18 A. I don't know.

19 Q. Who would have made the decision
20 about whether or not to share conclusions
21 from this report with KTR?

22 MR. KOH: Objection. You may
23 answer.

24 MR. SCHWARTZ: Objection. You
25 may answer.

1 MISSRY

2 THE WITNESS: I don't know if
3 that's a conclusion. I don't think
4 that's a conclusion. I think that's
5 an opinion but who would have made the
6 decision? It would have been a
7 discussion between Sam and I and then
8 we would have decided or Sam would
9 have said okay, send it to them or
10 don't send it to them.

11 BY MR. WALSH:

12 Q. Okay. So you don't remember if
13 this opinion was shared with KTR or not?

14 A. I don't remember.

15 Q. Did you provide any advice to
16 Vanderbilt regarding whether the potential
17 for an upzoning could be considered as
18 part of the fair market rent valuation
19 under the lease?

20 A. As I testified to before,
21 absolutely not. I don't get involved in
22 determining values or acting like an
23 appraiser when I'm not.

24 Q. Well, but my question was whether
25 you provided advice to Vanderbilt as to

1 MISSRY

2 that issue. Do you recall if you provided
3 advice?

4 A. I would not provide that advice
5 but no, I don't recall.

6 Q. Isn't that a legal question?

7 A. Not at all. That's an appraisal
8 question. Whether or not an appraiser
9 under its standards and rules can take
10 into account a potential upzoning of a
11 property in determining its valuation,
12 it's not a legal question at all.

13 Q. But couldn't that issue also be
14 governed by the lease?

15 A. The issue could be governed by
16 the lease if there was language in the
17 lease that provided for highest and best
18 use and potential or current upzonings of
19 a property.

20 Q. So isn't it at least partly a
21 legal question then as to what can and
22 cannot be considered by the appraisers?

23 MR. KOH: Objection. The witness
24 may answer.

25 THE WITNESS: No.

1 MISSRY

2 BY MR. WALSH:

3 Q. Even though it involves or could
4 involve interpreting a contract?

5 A. If interpreting a contract, an
6 appraiser would take a look at the
7 particular provision in determining what
8 the scope of the appraisal would be.

9 Q. If you could please look at the
10 page ending in 468, specifically bullet
11 four, it's on page 5 of the desk review
12 prepared by Metropolitan Valuation
13 Services.

14 A. I see it.

15 Q. So that paragraph says, "Should
16 the appraisal be utilized in conjunction
17 with the ground rent re-set, the highest
18 and best use analysis as improved should
19 consider the encumbrance in place with
20 respect to the ground lease which
21 precludes near-term demolition.

22 Similarly, the tenant retains additional
23 option periods which would limit any
24 redevelopment opportunity."

25 What do you understand that

1 MISSRY

2 paragraph to be?

3 A. I understand that to be David's
4 opinion.

5 Q. But what was -- if you could just
6 summarize what his opinion was.

7 MR. KOH: Objection.

8 THE WITNESS: You just read it.

9 BY MR. WALSH:

10 Q. How would you interpret that?

11 A. I wouldn't interpret it. I read
12 it and it's pretty clear what he means.

13 Q. And does he mean that the
14 encumbrance of the lease would need to be
15 considered in the highest and best use
16 analysis if these appraisals are being
17 used as part of the fair market rent
18 valuation process under the McDonald's
19 lease?

20 MR. KOH: Objection. The witness
21 may answer.

22 THE WITNESS: That's what he
23 says.

24 BY MR. WALSH:

25 Q. Do you recall having any

1 MISSRY

2 discussions with Vanderbilt about that
3 portion of Metropolitan's report?

4 A. I don't recall.

5 Q. Do you recall reading this
6 portion of Metropolitan's report?

7 A. Specifically, no.

8 Q. So you don't remember this
9 specific conclusion from the report?

10 A. No.

11 Q. Do you recall any discussions or
12 communications with anyone either inside
13 or outside Vanderbilt before Metropolitan
14 issued this report about whether
15 Vanderbilt's appraisal for the fair market
16 rent valuation process should consider any
17 encumbrance on the property including the
18 McDonald's ground lease for current
19 zoning?

20 A. No, I don't recall. The first
21 time I do recall is when Tom Tener brought
22 it up to me.

23 Q. And when did Tom Tener first
24 bring it up to you?

25 A. I think after we retained him,

1 MISSRY

2 sometime in the first quarter of 2019 or
3 so.

4 Q. Okay. So just to be clear, you
5 don't remember any communications or
6 discussions with anyone about whether the
7 encumbrances on the property should be
8 included in the fair market rent
9 valuations before Tom Tener brought it up
10 to you?

11 MR. SCHWARTZ: Objection. You
12 can answer.

13 THE WITNESS: No, because it
14 wouldn't be under the guise of my
15 representations. That's for an
16 appraiser to ascertain and to take
17 into account, not me.

18 MR. SCHWARTZ: Brendan, I would
19 appreciate a very short bathroom or
20 coffee break.

21 MR. WALSH: Why don't we take a
22 break now. We've been going for an
23 hour and 20 minutes.

24 THE VIDEOGRAPHER: Going off the
25 record at 11:31 a.m. This is the end

1 MISSRY

2 of media unit 1.

3 (Recess taken from 11:32 a.m. to
4 11:39 a.m.)

5 THE VIDEOGRAPHER: We're going
6 back on the record, 11:39 a.m. This
7 is the beginning of media unit 2.

8 Okay, you may proceed.

9 BY MR. WALSH:

10 Q. Mr. Missry, did you provide legal
11 advice to Vanderbilt about any of the
12 information, conclusions or opinions in
13 the Metropolitan Valuation Services report
14 that we were just looking at?

15 A. No.

16 Q. So why did you review it?

17 A. As I mentioned before, we were
18 interviewing different appraisers for the
19 purposes of determining who we wanted to
20 use for this process.

21 Q. And do you recall having any
22 discussions with Vanderbilt about that
23 specific paragraph on page 5 that we were
24 just talking about that references the
25 encumbrance of the lease?

1 MISSRY

2 A. I don't have any recollection.

3 Q. Did you speak with David Lyon
4 after he issued his report?

5 A. I don't recall.

6 Q. Did you ask any questions about
7 anything in his report?

8 A. I don't recall.

9 Q. Before the break, you mentioned
10 that the first time you spoke with anyone
11 about whether the encumbrance of the lease
12 should be included was when Tom Tener
13 reached out to you. Do you recall that?

14 A. Yes.

15 Q. When was the first time you
16 discussed that issue with Vanderbilt?

17 MR. KOH: Objection. You may
18 answer.

19 THE WITNESS: I don't recall
20 exactly. I don't recall.

21 BY MR. WALSH:

22 Q. Did Vanderbilt ask for legal
23 advice about the impact of the rule
24 described in 936 Second Avenue on a fair
25 market rent valuation process?

1 MISSRY

2 A. I don't recall.

3 MR. SCHWARTZ: Objection.

4 BY MR. WALSH:

5 Q. You don't recall?

6 A. I don't recall.

7 Q. And do you recall, whether they
8 asked for it or not, if you gave
9 Vanderbilt legal advice on that issue?

10 A. I responded to Tom Tener's e-mail
11 to me but I don't recall whether I spoke
12 to or when I spoke to Sam about it.

13 Q. I mentioned another case at the
14 beginning of the deposition called
15 New York Overnight Partners. Do you know
16 if you ever discussed that case with
17 Vanderbilt?

18 A. I doubt it.

19 Q. Are you familiar with that case?

20 A. I'm not.

21 MR. WALSH: If we could mark
22 VA 043064 as Exhibit P93.

23 (Exhibit P93, document Bates
24 labeled VA 043064, marked for
25 identification.)

1 MISSRY

2 BY MR. WALSH:

3 Q. This is a document that spans
4 through Bates number VA 043073. It's a
5 continuation of the e-mail string with
6 David Lyon that we were just looking at.

7 It's now available on my screen.

8 A. What is it marked as?

9 Q. Exhibit P93.

10 A. Okay.

11 Q. On the bottom of the first page,
12 there's an e-mail from you to David Lyon,
13 Sam Rottenberg with a copy to Tom Li dated
14 February 26, 2019.

15 Do you see that?

16 A. I do.

17 Q. And you're responding to the
18 e-mail we were just looking at where David
19 Lyon sent you a copy of his report on the
20 KTR report.

21 Do you see that?

22 A. I do.

23 Q. You wrote, "Thanks Dave. What
24 additional information and/or support do
25 you think is necessary for each

1 MISSRY

2 appraisal?"

3 What specifically were you asking
4 for?

5 MR. KOH: Objection. You may
6 answer.

7 THE WITNESS: I think he
8 mentioned in his previous e-mail that
9 additional support updated facts would
10 be suggested so I assume I was
11 responding to that -- to that comment
12 that he made.

13 BY MR. WALSH:

14 Q. Okay. Then David responded that
15 same day. Do you recall if you had any
16 follow-up conversations with David about
17 your question or anything else relating to
18 his reports?

19 A. I see the e-mails that you
20 presented me with but I don't recall.

21 Q. And you don't recall whether you
22 discussed the lease encumbrance issue with
23 David; is that right?

24 A. No, I have no recollection of
25 that.

1 MISSRY

2 Q. Now, at the bottom of that e-mail
3 on the first page from David Lyon to you,
4 it says, "KTR should include a land
5 residual as additional support, and
6 provide actual support for the 6.0 percent
7 reset number."

8 Did you discuss that issue with
9 David?

10 A. I have zero recollection.

11 Q. Do you recall whether you
12 discussed this issue with Vanderbilt?

13 A. No idea.

14 Q. Do you recall if you discussed
15 this issue with Tom Tener or Shaun Kest of
16 KTR?

17 A. No idea.

18 Q. After KTR was retained, who was
19 dealing primarily with KTR, was it you or
20 Sam Rottenberg, some combination?

21 A. I think it was a combination of
22 both of us but I think Tom had to do his
23 work so we were sort of just waiting for
24 him to do his work.

25 Q. I'm not trying to suggest that

1 MISSRY

2 this comment or any other comment or
3 opinion from Metropolitan's report was
4 shared. Had it been shared, would it have
5 been shared by you or by Sam Rottenberg
6 with Tom Tener?

7 MR. KOH: Objection.

8 MR. SCHWARTZ: Objection.

9 MR. KOH: Objection. The witness
10 may answer.

11 THE WITNESS: Either of us.

12 BY MR. WALSH:

13 Q. Do you recall when you first
14 communicated with Tom Tener or Shaun Kest
15 at KTR?

16 A. It must have been after Sam
17 retained us. I don't know exactly when.

18 MR. WALSH: Okay, if we could
19 pull up P59, please.

20 BY MR. WALSH:

21 Q. It's now available on my screen.
22 P59. It's an e-mail chain.

23 A. Yes.

24 Q. 027513 to 514. The top e-mail is
25 an e-mail from looks like Tom Li to Shaun

1 MISSRY

2 Kest and Tom Tener dated February 25,
3 2019, sending along your contact
4 information.

5 A. Got it.

6 Q. Does it seem like late February
7 2019 would have been around the time that
8 you first spoke with KTR?

9 MR. SCHWARTZ: Objection. You
10 may answer.

11 THE WITNESS: Late February,
12 early March, sure.

13 MR. WALSH: If we could pull up
14 P60, please.

15 VERITEXT CONCIERGE: It's now
16 available.

17 THE WITNESS: P60, 6-0?

18 BY MR. WALSH:

19 Q. Yes.

20 A. It's loading. Got it.

21 Q. Okay. So on February 25, 2019,
22 Tom Tener sent an appointment, looks like
23 a calendar invite to Tom Li and Shaun Kest
24 for a meeting at your office at 885 Second
25 Avenue on February 28, 2019.

1 MISSRY

2 Do you see that?

3 A. I see that.

4 MR. SCHWARTZ: Objection.

5 BY MR. WALSH:

6 Q. Do you recall whether you had
7 spoken with Tom Tener or Shaun Kest about
8 setting up a meeting around this time?

9 A. I believe I did.

10 Q. And what was discussed the first
11 time you spoke with them?

12 A. I'm not sure if I spoke to Tom
13 before this meeting so I don't recall
14 that.

15 Q. Okay. But you do recall a
16 meeting at your office in looks like late
17 February, 2019 with KTR?

18 A. I recall meeting him. I don't
19 recall the date other than what I see on
20 this screen.

21 Q. Okay. So what was the purpose of
22 that meeting?

23 A. The purpose of the meeting like
24 other meetings we had with others and
25 phone calls we had with others was to

1 MISSRY

2 interview potential appraisers for this
3 assignment.

4 Q. Who else attended the meeting?

5 A. That day?

6 Q. Yeah.

7 A. It would have been Sam, myself,
8 probably Tom Li and Tom Tener.

9 Q. And you described this as an
10 interview. What types of questions were
11 the appraisers being asked at this
12 meeting?

13 A. I don't recall the exact
14 questions.

15 Q. Were you the only person asking
16 questions or were Tom Li and Sam
17 Rottenberg also asking questions?

18 A. I'm sure we were all -- Tom Li is
19 relatively quiet so it's probably just me
20 and Sam.

21 Q. Okay. Do you recall discussing
22 KTR's experience in litigation?

23 A. Possibly, but I don't recall.

24 Q. And why would that have been
25 relevant?

1 MISSRY

2 A. I don't recall.

3 Q. Did you discuss KTR's experience
4 in fair market rent valuation proceedings?

5 A. Possibly. Probably, but I don't
6 know.

7 Q. Do you recall anything about what
8 was discussed at this meeting?

9 A. Specifically, no. I can make
10 assumptions but if you're asking for
11 specific recollections, I just don't
12 remember.

13 Q. How about a discussion of the
14 appraisal method to be used by the
15 appraisers?

16 A. That's not -- it's just not my
17 bailiwick so I would never have that
18 discussion regarding the methodology of
19 someone doing the appraisal.

20 Q. And is that because it's not a
21 legal issue?

22 A. It's because, A, I don't know
23 what the methodologies necessarily are for
24 this particular type of appraisal; B, I
25 don't think it would be appropriate for me

1 MISSRY

2 to tell an appraiser what to do just like
3 it wouldn't be appropriate for an
4 appraiser to tell me what to do.

5 Q. The potential engagement that you
6 were interviewing KTR for, was that
7 intended to be an entirely new engagement
8 or an add-on to the work that KTR did in
9 2018 before you got involved?

10 MR. KOH: Objection. The witness
11 may answer.

12 MR. SCHWARTZ: Objection.

13 THE WITNESS: Entirely, no.

14 BY MR. WALSH:

15 Q. And do you recall discussing with
16 them how the work they might be retained
17 to do in 2019 would differ from the work
18 they did in 2018?

19 A. No, because I wasn't familiar
20 with the 2018 work. I wasn't representing
21 the client at the time.

22 Q. But you had read Metropolitan's
23 review of KTR's prior work; right?

24 A. Yes.

25 Q. And had you reviewed KTR's 2018

1 MISSRY

2 report before you met with them?

3 A. Before I met with Tom Tener?

4 Q. Yeah.

5 A. Speculation. I mean I could
6 have. I probably did. I may have. I
7 don't recall.

8 Q. Okay. And that report was not
9 prepared in connection with the fair
10 market value process in the McDonald's
11 lease; right?

12 A. I have no idea. I wasn't
13 representing Vanderbilt at the time.

14 Q. Do you recall any discussions
15 during that meeting or before KTR was
16 retained about the prior report or reports
17 that KTR prepared for Vanderbilt?

18 A. No.

19 Q. Now you also met with Michelle
20 Zell of BBG around that time; right?

21 A. Sounds familiar.

22 MR. WALSH: If we could please
23 mark as Exhibit P94 VA 012525. It is
24 a two-page e-mail chain.

25 (Exhibit P94, document Bates

1 MISSRY

2 labeled VA 012525, marked for
3 identification.)

4 BY MR. WALSH:

5 Q. Before we get to that document,
6 what was the purpose of meeting with BBG?

7 A. Same purpose as meeting and
8 talking to the other appraisers.

9 Q. Because you and/or Vanderbilt
10 were considering retaining BBG to serve as
11 Vanderbilt's appraiser for the fair market
12 rent valuation process on the McDonald's
13 lease?

14 A. Yes.

15 Q. Do you recall who else attended
16 that meeting with BBG?

17 A. I don't.

18 Q. Safe to assume Tom Li and Sam
19 Rottenberg would have attended as well?

20 A. Always safe to assume that it was
21 Sam. I don't recall. I don't recall the
22 meeting with Michelle frankly.

23 Q. Is it safe to assume that Sam was
24 there because he was very involved in this
25 process?

1 MISSRY

2 MR. KOH: Objection. You may
3 answer.

4 THE WITNESS: Yeah.

5 BY MR. WALSH:

6 Q. How would you describe Sam's
7 involvement in this process?

8 A. I would describe Sam's
9 involvement as any other concerned
10 property owner that is trying to negotiate
11 and/or ascertain the rent for the
12 extension term. It's a 20-year extension
13 term so it was a pretty important process.

14 Q. So he was actively involved in
15 the process?

16 A. Yes.

17 Q. Okay, if you could pull up what's
18 now been marked as Exhibit P94.

19 A. Okay.

20 Q. There's two e-mails or I guess
21 really maybe three if you count the
22 appointment on the second page.

23 The bottom e-mail on the first
24 page is an e-mail from Michelle Zell at
25 BBG dated February 28, 2019. It's to you,

1 MISSRY

2 Tom Li, Abel Santamaria and Sam
3 Rottenberg. And she says, "Hi. It was a
4 pleasure meeting you today." And then she
5 provides contact information for three
6 other appraisers.

7 Do you recall why she sent you
8 the contact information for these three
9 appraisers, specifically Brian Corcoran at
10 Cushman, Dan Sciannameo at Albert
11 Valuation Group, and Theresa Nygard at
12 KTR?

13 A. I asked all the appraisers that I
14 spoke to or met with for their
15 recommendations for great appraisers so
16 she was probably responding to that
17 request.

18 Q. And why were you looking for
19 great appraisers?

20 A. We wanted to interview several
21 appraisers and I was getting
22 recommendations.

23 Q. Were these additional appraisers
24 that you were inquiring about, were you
25 considering them to potentially hire on

1 MISSRY

2 behalf of Vanderbilt or as a neutral in
3 this process?

4 A. No, on behalf of Vanderbilt. We
5 didn't get to -- we wouldn't even be
6 discussing the third appraiser until both
7 letters of opinion of value were submitted
8 and done. We were just trying to get the
9 proper and most well-suited appraiser that
10 was familiar with Brooklyn, was familiar
11 with downtown Brooklyn in these types of
12 matters.

13 Q. So besides Michelle Zell of BBG
14 and Tom Tener of KTR, who else did you
15 interview to potentially serve as an
16 appraiser?

17 A. I think we interviewed Dave Lyon
18 as I mentioned before. I think I called
19 Amanda Aaron because she's the first
20 person in my contact list and I knew from
21 previous engagements she was someone who
22 did a lot of appraisals. I'm not sure who
23 else I may have spoken to.

24 Q. Do you recall in any of these
25 meetings discussing whether the

1 MISSRY

2 encumbrance of the lease or current zoning
3 would need to be factored into the
4 appraisal to be prepared for Vanderbilt?

5 A. I have no recollection.

6 Q. Did BBG express interest in
7 serving as Vanderbilt's appraiser?

8 A. I'm not sure.

9 Q. Did any of the people you spoke
10 with not express interest in serving as
11 Vanderbilt's appraiser?

12 A. Yes.

13 Q. And did they give reasons why?

14 A. I believe so.

15 Q. Who do you recall?

16 A. I think Amanda said it wasn't in
17 her field of expertise, she wasn't
18 familiar with this type of assignment.
19 That's what I recall with respect to her.
20 Michelle, I'm not sure. You can read into
21 her e-mail giving me three different
22 appraisers. Maybe it wasn't within her
23 bailiwick but I don't know. I don't
24 recall that.

25 Q. So do you recall whether BBG

1 MISSRY

2 opted out serving as Vanderbilt's
3 appraiser?

4 A. I don't recall that.

5 MR. WALSH: Okay, if we can pull
6 up what's been previously marked as
7 P28.

8 THE WITNESS: Okay.

9 BY MR. WALSH:

10 Q. So this is a cover e-mail with
11 the Bates stamp VA 015989. It spans
12 through 996. It's an e-mail from Abel
13 Santamaria in your office to Tom Tener
14 attaching a signed copy of a retainer
15 letter dated March 8, 2019, as well as a
16 copy of a check from Vanderbilt Atlantic
17 Holdings to KTR in the amount of \$15,000.

18 Do you see that?

19 A. I do.

20 Q. Is Abel Santamaria your
21 assistant?

22 A. He is.

23 Q. Who drafted this letter, this
24 engagement letter?

25 MR. SCHWARTZ: Objection. You

1 MISSRY

2 can answer if you know.

3 MR. KOH: Same objection. Go
4 ahead.

5 THE WITNESS: I don't know who
6 drafted it.

7 BY MR. WALSH:

8 Q. Do you recall if you drafted it?

9 A. I did not draft this.

10 Q. Do you recall going back and
11 forth with KTR about the contents of this
12 letter?

13 A. I don't think I can go back and
14 forth with KTR. This is their retainer
15 letter.

16 Q. But it explains the type of work
17 and the purpose?

18 A. Um-hum.

19 Q. And would you have read this
20 letter before signing it?

21 A. Sure.

22 Q. And if you had disagreed with
23 anything in here, would you have put that
24 disagreement somewhere?

25 A. Hypothetically, yes.

1 MISSRY

2 Q. Now, why did your firm retain KTR
3 to serve as Vanderbilt's appraiser for the
4 fair market rent valuation process?

5 A. I don't know. It's just
6 appropriate to do that.

7 Q. Why do you believe it's
8 appropriate to do that?

9 A. Because we were retained to
10 represent the client in connection with
11 this process so we generally retain the
12 professionals.

13 Q. Did you retain any other
14 appraisers in connection with your
15 retention by Vanderbilt?

16 A. I don't know who retained David
17 Lyon but no, we didn't retain any other
18 professionals.

19 Q. And this retention agreement was
20 to retain KTR specifically to serve as
21 Vanderbilt's appraiser for purposes of the
22 fair market rent valuation process in the
23 McDonald's lease; right?

24 A. Yes.

25 Q. If we could, looking at the first

1 MISSRY

2 page of the agreement, second paragraph,
3 about halfway down on the right-hand side,
4 it begins with "It is anticipated that the
5 FMV."

6 A. I'm sorry, where are you?

7 Q. It's the second full paragraph.

8 A. I got it, I got it.

9 Q. It says, "It is anticipated that
10 the FMV will be based on the standard
11 market data approach technique for valuing
12 vacant land," and in parentheses it says,
13 "the sales comparison approach."

14 Do you see that?

15 A. I do.

16 Q. Do you recall why that language
17 was included in this agreement?

18 A. It seems like Tom took the lease
19 provision and incorporated a bunch of
20 things from the lease provision into his
21 retainer letter.

22 Q. And do you recall that the option
23 rent addendum refers to something called
24 the standard market data approach?

25 A. If you put it in front of me I'll

1 MISSRY

2 recall it but, you know, I'm assuming he
3 copied this from that addendum. It
4 references the addendum so I assume it's
5 in there.

6 Q. So did you recommend that he use
7 or that KTR use the sales comparison
8 approach for his valuation?

9 A. Absolutely not.

10 Q. Did you provide KTR with any
11 directions about the approach or
12 methodologies or assumptions to be used
13 for purposes of their valuation?

14 A. The only thing that I gave Tom
15 Tener my opinion on was the 936 case.

16 Q. But that was after this
17 engagement letter was drafted; right?

18 A. I don't know that they -- I would
19 assume it would be afterwards because they
20 didn't begin the process until after this
21 was signed.

22 Q. Now, do you recall whether you
23 compared the language in this engagement
24 letter to the language in the option rent
25 addendum to the lease?

1 MISSRY

2 A. I assume I did.

3 Q. Okay. And you would have done
4 that to make sure that he was appraising
5 the property in compliance with the option
6 rent addendum; is that right?

7 A. He was sent the lease and he was
8 sent the option rent addendum and his role
9 was to appraise the property and determine
10 the fair market rental value in accordance
11 with that addendum.

12 Q. I'm going to jump ahead but I
13 know that eventually in June of 2019 you
14 had a meeting with McDonald's and
15 McDonald's appraiser. Before that
16 meeting, so anywhere from the time you
17 were retained until that meeting, do you
18 recall having any discussions with
19 Vanderbilt about the specific appraisal
20 method to be used by KTR in its valuation?

21 A. No, I don't recall.

22 Q. So on the second page, second
23 paragraph, last sentence.

24 A. Second page, second paragraph,
25 last sentence, okay.

1 MISSRY

2 Q. It says, "The report will be
3 prepared subject to the attached Basic
4 Assumptions and Limiting Conditions." And
5 then those basic assumptions and limiting
6 conditions are listed at pages 4, 5 and 6.
7 The third point on page 4 under Basic
8 Assumptions and Limiting Conditions says,
9 "The property is appraised free and clear
10 of any or all liens or encumbrances unless
11 otherwise stated."

12 Do you see that?

13 A. I do.

14 Q. So what did you do before you
15 signed this letter to confirm that that
16 was correct and appropriate?

17 A. I don't recall.

18 MR. SCHWARTZ: Objection.

19 MR. KOH: Same objection.

20 BY MR. WALSH:

21 Q. And you don't recall any specific
22 conversations about that basic assumption
23 and limiting condition?

24 A. I don't recall.

25 Q. Do you recall providing any legal

1 MISSRY

2 advice to Vanderbilt about that assumption
3 and limiting condition?

4 A. No, I don't recall.

5 Q. A little further down in the
6 second page, it says, "In order to
7 initiate the assignment, the following
8 information, if available, should be
9 provided as soon as possible." And the
10 first bullet point is "Copies of any
11 leases that encumber the properties."

12 Do you see that?

13 A. I do.

14 Q. What did you do to comply with
15 KTR's request to provide copies of any
16 leases that encumber the properties?

17 MR. SCHWARTZ: Objection.

18 MR. KOH: Same objection.

19 THE WITNESS: Either myself or
20 Vanderbilt would have provided any
21 information that was requested by Tom.

22 BY MR. WALSH:

23 Q. Here he specifically requested
24 copies of any leases that encumber the
25 properties; right?

1 MISSRY

2 A. Yes.

3 Q. So did you take any steps to
4 provide KTR with copies of the leases that
5 encumber the properties including the
6 McDonald's lease and Vanderbilt's ground
7 lease dated November 30, 2017?

8 A. Sam, Vanderbilt or myself or
9 someone from my office would have provided
10 them with the information that they
11 requested.

12 Q. Okay. Tom Tener has testified
13 that he was never provided a copy of
14 Vanderbilt's ground lease dated November
15 30, 2017. Do you recall ever providing
16 that document to him?

17 MR. SCHWARTZ: Objection. You
18 can answer.

19 THE WITNESS: I don't necessarily
20 recall that ground lease. No, I don't
21 recall.

22 BY MR. WALSH:

23 Q. Had you ever reviewed that ground
24 lease?

25 A. I don't know.

1 MISSRY

2 Q. So you're not sure if you've seen
3 it?

4 A. I don't know if I've seen it. I
5 don't.

6 Q. Were you aware of it at the time?

7 A. I don't recall.

8 Q. And so do you believe that if
9 anyone should have provided it that should
10 have been Sam Rottenberg?

11 MR. KOH: Objection. You may
12 answer.

13 MR. SCHWARTZ: Objection.

14 THE WITNESS: Either myself or
15 Sam and his team -- sorry, either
16 Wachtel Missry or Vanderbilt would
17 have provided any appraiser with the
18 information that they requested.

19 BY MR. WALSH:

20 Q. Can you think of any reason why
21 any information that was requested would
22 not have been provided?

23 A. No.

24 Q. If we could please pull up what's
25 been previously marked as P4. And by the

MISSRY

way, this portion of the engagement letter that we were just looking at also asks for additional information such as zoning analysis, development plans, details of the most recent transfers, contracts of sale, current listings. It also asks for the most recent minutes or releases relating to the M-Crown proposed rezoning. Who would have been responsible for sending that information to KTR?

A. In all likelihood, Vanderbilt.

Q. And why do you say that?

A. Because they were the repository of all information. They had all the information, it was their property.

Q. If you could pull up P4, this is the November 30, 2017 ground lease between MMB Associates LLC as landlord and Vanderbilt Atlantic Holdings LLC as tenant for the property located at 840 Atlantic Avenue, Brooklyn.

A. I see it.

Q. Does this refresh your recollection at all as to whether or not

1 MISSRY

2 you've ever seen this ground lease?

3 A. No.

4 Q. Now discovery in this case has
5 revealed that Vanderbilt has described
6 this November 30, 2017 ground lease as a
7 ground lease between related parties. As
8 an experienced real estate attorney, what
9 does that phrase mean to you?

10 MR. KOH: Objection. You may
11 answer.

12 THE WITNESS: It means that there
13 is some legal relation between the
14 landlord and the tenant.

15 BY MR. WALSH:

16 Q. And when you say some sort of
17 legal relation, what do you mean by that?
18 Is there any sort of minimum relationship
19 that would be required to make something a
20 related party lease?

21 A. Not necessarily.

22 Q. Are related party leases
23 generally negotiated at arm's length?

24 MR. KOH: Objection. You may
25 answer.

1 MISSRY

2 MR. SCHWARTZ: Objection.

3 THE WITNESS: I don't know who
4 MMB is. I don't know how this was
5 negotiated. I'm not sure I ever saw
6 it before so I just can't answer that
7 question.

8 BY MR. WALSH:

9 Q. Well, my question is in your
10 experience, are leases between related
11 parties generally negotiated at arm's
12 length?

13 MR. KOH: Objection. The witness
14 may answer.

15 MR. SCHWARTZ: Objection.

16 THE WITNESS: They absolutely
17 could be. It depends on the
18 relationship between the two parties.

19 BY MR. WALSH:

20 Q. Okay. Are you aware that this
21 lease provides that if McDonald's leaves
22 the property before November 2027 and the
23 property has not been rezoned by that
24 time, Vanderbilt would pay annual rent to
25 MMB in the amount of \$360,000 per year?

1 MISSRY

2 MR. SCHWARTZ: Objection.

3 THE WITNESS: No.

4 BY MR. WALSH:

5 Q. Are you aware that so long as
6 McDonald's remains on the property,
7 Vanderbilt must pay over every dollar of
8 rent it receives from McDonald's to MMB
9 Associates?

10 A. No.

11 Q. So you were not aware of either
12 of those facts before right now?

13 A. I was not.

14 MR. SCHWARTZ: Objection.

15 BY MR. WALSH:

16 Q. Do you believe that information
17 in this lease would have been relevant to
18 KTR's engagement?

19 MR. KOH: Objection. The witness
20 may answer.

21 THE WITNESS: No.

22 BY MR. WALSH:

23 Q. Why do you say that?

24 A. KTR was retained to determine
25 what the fair market rental value of the

1 MISSRY

2 premises was and having a 99-year ground
3 lease is irrelevant. It's tantamount to
4 ownership of the property. So no, I don't
5 think it has anything to do with KTR's
6 ability to appraise the fair market rental
7 value of the property.

8 Q. Okay, but KTR had asked for
9 leases that encumber the properties;
10 right?

11 A. Yeah, but that wasn't your
12 question. Your question was should they
13 have been provided with this and what
14 effect would it have. I don't see --

15 Q. But -- I'm sorry.

16 Cathi, I'm sorry. Did you get
17 that? I interrupted and I should not
18 have.

19 And I guess you have never seen
20 it before but it contains rent provisions
21 and you know it was only negotiated in
22 November -- it was signed in November of
23 2017 and it contains provisions dictating
24 the rent that Vanderbilt will pay to MMB
25 for its ground lease. You don't think

1 MISSRY

2 that information would have any relevance
3 to the rent that McDonald's might owe
4 under its ground lease?

5 MR. KOH: Objection. The witness
6 may answer.

7 MR. SCHWARTZ: Objection.

8 THE WITNESS: I take it as
9 zero -- zero effect or correlation to
10 the rent that McDonald's is required
11 to pay under their lease.

12 BY MR. WALSH:

13 Q. Okay. Whose decision was it to
14 not provide the Vanderbilt lease to KTR?

15 MR. KOH: Objection. You may
16 answer.

17 MR. SCHWARTZ: Objection.

18 THE WITNESS: I have no idea. I
19 don't know if it was provided or not
20 provided. I don't recall seeing this.

21 BY MR. WALSH:

22 Q. Do you recall any discussions
23 with Vanderbilt about complying with KTR's
24 request to provide copies of leases that
25 encumber the properties?

1 MISSRY

2 A. Vanderbilt or Wachtel Missry
3 would have provided information requested
4 by KTR. If something wasn't provided, I
5 don't know.

6 Q. So if something was not provided,
7 that would have been somebody else's
8 decision, not yours?

9 MR. KOH: Objection. Go ahead
10 and answer.

11 MR. SCHWARTZ: Objection.

12 THE WITNESS: Yes.

13 BY MR. WALSH:

14 Q. And that would have been Sam
15 Rottenberg's decision?

16 MR. KOH: Objection. The witness
17 may answer.

18 THE WITNESS: I don't know.

19 BY MR. WALSH:

20 Q. Who else could have made that
21 decision?

22 A. No idea.

23 MR. KOH: Same objection.

24 THE WITNESS: You mentioned
25 before that Sam may not have been the

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owner of Vanderbilt so I don't know.
You're confusing me.

MR. SCHWARTZ: I was going to say
why don't we take the break now.

MR. WALSH: Yes, why don't we
stop for lunch now and how long does
everybody need? Why don't we go off
the record first.

THE VIDEOGRAPHER: Off the record
at 12:25 p.m. This is the end of
media unit 2.

(Lunch recess taken at
12:25 p.m.)

1 MISSRY

2 A F T E R N O O N S E S S I O N

3 (Time noted: 1:04 p.m.)

4 M O R R I S M I S S R Y, resumed and
5 testified as follows:

6 THE VIDEOGRAPHER: Going back on
7 the record at 1:04 p.m. This is the
8 beginning of media unit 3. You may
9 proceed.

10 CONTINUED EXAMINATION

11 BY MR. WALSH:

12 Q. Mr. Missry, can you just please
13 confirm that you still have all screens
14 other than -- all programs other than Zoom
15 and Exhibit Share closed and that you
16 don't have a phone on or not looking at
17 your phone right now?

18 A. I do have to close my Outlook so
19 just give me a second.

20 Q. Okay.

21 A. Let's see, Veritext and Zoom,
22 yeah, I can confirm that.

23 Q. And is your phone away?

24 A. Yes.

25 Q. Okay, great.

1 MISSRY

2 So I think we touched on this
3 before but do you know if Vanderbilt ever
4 discussed with Tom Tener before April 2019
5 whether encumbrances on the property
6 should be considered in his fair market
7 rent valuation?

8 MR. SCHWARTZ: Objection.

9 THE WITNESS: I have no idea.

10 BY MR. WALSH:

11 Q. And you did not have any such
12 discussions with him before April 2019; is
13 that right?

14 A. No, we had an e-mail exchange I
15 think before April 2019 or whenever that
16 e-mail exchange was.

17 Q. Let's pull that up. That's
18 Exhibit P29, please. It should be
19 available.

20 A. Okay.

21 Q. On Monday, April 1, 2019 at
22 9:46 a.m., Tom Tener sent you an e-mail
23 with a copy to Sam Rottenberg with the
24 subject, Question, and he wrote, "Morris,
25 are you available to quickly discuss a

1 MISSRY

2 question that I have about the language of
3 the lease?"

4 Do you see that?

5 A. Yes.

6 Q. And is this one of the e-mails
7 that you were just talking about when Tom
8 Tener raised this issue about the
9 936 Second Avenue case for the first time?

10 A. I would have to see the other
11 e-mail to see the context.

12 Q. If we could pull up P30. P30 is
13 another e-mail from Tom Tener and it's to
14 you, subject, Confidential.

15 A. I see it.

16 Q. "Morris, This is the Appellate
17 Court decision I mentioned in our
18 conversation." 936 Second Avenue case is
19 attached.

20 Do you see that?

21 A. Yes.

22 Q. Okay, so going back to P29 which
23 is the e-mail that Tom sent you earlier in
24 the day, do these e-mails refresh your
25 recollection about what Tom wanted to

1 MISSRY

2 discuss with you on the morning of April
3 1, 2019?

4 A. Give me a second.

5 It looks like they are related.

6 Q. Okay, do you recall him having
7 any other questions about the language of
8 the lease around this time?

9 A. No.

10 Q. Okay. Do you recall at what
11 point in the day you spoke with Tom Tener?

12 A. It said 4:28 p.m. I think was the
13 e-mail but no, I don't recall.

14 MR. WALSH: If we could please
15 mark VA 001963 as Exhibit P95.

16 (Exhibit P95, document Bates
17 labeled VA 001963, marked for
18 identification.)

19 BY MR. WALSH:

20 Q. This is a continuation of P29.
21 It's VA 001963 to 64. It's a response
22 from you to Tom Tener and Sam Rottenberg
23 stating now, question mark.

24 A. Okay.

25 Q. So it looks like about two hours

1 MISSRY

2 later you responded and suggested that you
3 speak now; right?

4 A. Okay.

5 Q. Is that right?

6 A. That's what the e-mail says,
7 sure.

8 Q. And at some point that day you
9 spoke with Tom Tener; correct?

10 A. I don't recall.

11 Q. Well, P30 which we've already
12 looked at, he wrote at 4:28 p.m., "Morris,
13 This is the Appellate Court decision that
14 I mentioned in our conversation."

15 A. Okay.

16 Q. So do you believe you spoke with
17 Tom that day?

18 A. If the e-mails reflect it, I'm
19 sure I did.

20 Q. And do you recall if -- so Sam
21 Rottenberg was copied on P29 and P95 which
22 were the e-mails earlier in the day. Did
23 he participate in the conversation you
24 ultimately had with Tom Tener that day?

25 A. I don't know.

1 MISSRY

2 Q. Just based upon your recollection
3 of Sam's involvement in the process, do
4 you believe this was a conversation that
5 he would have been involved in?

6 MR. SCHWARTZ: Objection.

7 MR. KOH: Go ahead.

8 THE WITNESS: I would be
9 speculating because I don't recall if
10 he was on the call or not.

11 BY MR. WALSH:

12 Q. Do you remember anything about
13 the call that you had with Tom Tener on
14 April 1, 2019?

15 MR. SCHWARTZ: Objection. You
16 can answer.

17 THE WITNESS: No.

18 BY MR. WALSH:

19 Q. So we've already looked at P30
20 which is Tom sending you a copy of the
21 936 Second Avenue case. Do you recall
22 your reaction when you first reviewed this
23 case -- actually strike that.

24 Do you recall your reaction to
25 Tom's question about whether encumbrances

1 MISSRY

2 on the lease needed to be included in his
3 valuation?

4 A. I don't recall. I know I
5 responded to an e-mail which I reviewed
6 over the past week or so but sitting here
7 right now, I would have to take a look at
8 it.

9 Q. Was this the first time you
10 became aware of the Second Avenue case
11 when Tom sent it to you?

12 A. I believe so. I think you asked
13 me that before.

14 Q. What was your reaction when you
15 read it?

16 A. I can only tell you what my
17 reaction was after me reviewing e-mails
18 and recalling what happened so if you'd
19 like that answer, I can tell you.

20 Q. Okay, we'll talk about those
21 e-mails in a moment, but you don't as you
22 sit here today recall what your reaction
23 was to reading the case?

24 A. I didn't think it was applicable.

25 Q. Okay. But you read it when he

1 MISSRY

2 A. Yes.

3 Q. When do you recall those
4 discussions?

5 A. What I recall is discussing it.
6 Sam and I used to speak every couple,
7 three days so we discussed a lot of
8 things. But what I do recall sitting here
9 today is when we discussed it, when Mike
10 Meyer from McDonald's was trying to hold
11 us up and reinvent the wheel, when we were
12 trying to jointly retain the third
13 appraiser and was misinterpreting the
14 lease language in the option term rider
15 and insisting that we had to take the
16 lease into account -- or the appraisers
17 had to take the lease into account in
18 doing their appraisals, so I do remember
19 having that discussion but I believe it
20 was sometime after the initial time.

21 Q. If we could please -- let's see,
22 hold on. If you could just refer to P30
23 which is the e-mail from Tom Tener to you
24 attaching the case. And just look at the
25 second page of the 936 opinion. You may

1 MISSRY

2 need to rotate your screen in order to see
3 it.

4 A. Okay.

5 Q. So about halfway down the page
6 under Analysis it mentions the court's
7 previous decision in New York Overnight
8 Partners. A little bit later it says, the
9 lease expressly excluded the definition of
10 land -- expressly excluded from the
11 definition of land the buildings and
12 improvements thereon erected. And it
13 says, "When the parties deadlocked on the
14 meaning of the phrase appraised value of
15 the land, they sought judicial
16 interpretation to settle the dispute. We
17 affirmed the Appellate Division order
18 directing the appraiser to determine the
19 value of the land as if vacant and
20 unimproved, subject to current zoning
21 restrictions and contractual limitations,
22 and to consider the effect of the lease on
23 the value of the land."

24 The court is there describing its
25 previous decision in the New York

1 MISSRY

2 Overnight Partners. And then it says, "In
3 reaching that conclusion, we observed that
4 when the language of the lease so
5 dictates, appraisals must take into
6 consideration all restrictions - including
7 current zoning regulations and
8 encumbrances on the land as well as the
9 lease term."

10 A. Um-hum.

11 Q. Further down on the page when
12 it's talking about the lease at issue at
13 936 Second Avenue, this is the second to
14 last paragraph on that same page, it says,
15 "The lease is silent as to whether the
16 lease itself should be taken into account
17 in determining the value of the demised
18 premises." And then the court went on to
19 hold that absent -- and this is on the
20 third page, "absent an agreement to the
21 contrary, the effect of a net lease must
22 be considered in valuing property for the
23 purpose of setting rent for a renewal
24 lease term. Such a rule comports with
25 precedent, appraisal practices and common

1 MISSRY

2 sense. If the parties to a lease desire
3 to exclude that encumbrance in valuing the
4 property, they need only include language
5 to that effect in their agreement."

6 Do you see that?

7 A. I do.

8 Q. Okay. But when you read this
9 case, you concluded that this did not
10 require Tom Tener to consider the
11 encumbrance of the lease in his valuation;
12 right?

13 MR. SCHWARTZ: Objection.

14 THE WITNESS: Yes.

15 BY MR. WALSH:

16 Q. How did you reach that
17 conclusion?

18 A. When you read the provision of
19 the option to rider, I believe it says you
20 have to assume that it's vacant land and
21 that the premises are not encumbered by
22 the improvements. And there was some
23 other language in there and based upon my
24 reading of that particular provision and
25 this case, it was my opinion at the time

1 MISSRY

2 that it had the necessary language to
3 exclude taking the lease into account.

4 Q. Was that your interpretation of
5 the case or somebody else's interpretation
6 of the case?

7 A. Well, you have my e-mail to Tom
8 so you know it was my interpretation.

9 Q. Well, I don't know if it was your
10 interpretation or somebody else's. Was
11 that your interpretation of the case or --

12 A. It was my interpretation of the
13 option term rider as this case -- and this
14 case frankly.

15 Q. Now, if we could pull up P31.
16 This is a two-page e-mail chain, VA 001753
17 to 1754. This is an e-mail from you to
18 Tom Tener, April 1, 2019 at 4:41 p.m. and
19 then a response from Tom Tener at
20 5:30 p.m.

21 A. Um-hum.

22 Q. Is this the communication you
23 were just talking about where you told Tom
24 that you did not believe the case was
25 applicable to the McDonald's lease?

1 MISSRY

2 A. Yes.

3 Q. And you said, "I just reviewed
4 the case and I don't agree with the
5 analysis you mentioned to me and I don't
6 see it in there."

7 What analysis did Tom mention to
8 you?

9 A. Tom sent me the case and
10 mentioned that some people hold that you
11 have to take the lease into effect. I
12 told him I disagreed with that
13 interpretation.

14 Q. Did Tom explain why he was asking
15 that question?

16 A. No, he was aware of the case so
17 he just wanted to get my thoughts on it.

18 Q. Did he say what impact the case
19 could have on his valuation?

20 A. No.

21 Q. Did he say he believed that the
22 936 Second Avenue case required him to
23 consider the encumbrance of the lease in
24 his analysis?

25 A. No.

1 MISSRY

2 Q. So he just said that -- he was
3 just wondering whether it applied, he
4 didn't give you his view one way or the
5 other?

6 A. He made me aware of the case, he
7 asked me for my interpretation, I gave him
8 my interpretation.

9 Q. Now is the interpretation that
10 you gave him based upon solely your
11 opinion or the opinion of others?

12 A. I can't tell you sitting here
13 today that I didn't discuss it with any of
14 my partners, but it was my opinion based
15 upon my review of the case and of the
16 poorly drafted option term rider
17 provision.

18 Q. If we could pull up P16 which is
19 the option rent agreement.

20 A. P16?

21 Q. Yes. It will need to be put up
22 there.

23 A. Let me know when it's up.

24 Q. Okay, it should be up.

25 A. P16, okay, I'm in it.

1 MISSRY

2 Q. This is the option rent addendum
3 to the McDonald's lease; right?

4 A. Yes.

5 Q. And this is the rent addendum you
6 were just referring to?

7 A. Yes.

8 Q. Where in the option rent addendum
9 do you believe it states that the lease
10 should not be considered in the valuation?

11 MR. SCHWARTZ: Objection.

12 MR. KOH: Same objection. Go
13 ahead and answer.

14 THE WITNESS: First of all, this
15 is not a net lease which the case
16 described. Second page, it says the
17 rental value shall be established
18 based upon a definition of fair market
19 rental value as the price which an
20 average well-informed tenant would
21 pay, an average well-informed --
22 exclusive of tenant's improvements
23 knowing all the uses to which the
24 property can be put without duress on
25 either party. So to me my

MISSRY

interpretation was exclusive of
tenant's improvements being there's
nothing there. All the uses to the
property can be put means that you're
assuming it's vacant and unencumbered
because assuming the uses to which the
property can be put without it being
vacant and encumbered is sort of
irrelevant. So that was my
interpretation.

BY MR. WALSH:

Q. The language we just read from
the 936 case --

A. Yes.

Q. -- talked about how the party --
I guess the landlord in that case tried to
distinguish New York Overnight Partners,
quote, because the property in that case
was to be valued as a vacant while the
valuation of the property here must
include both the land and the buildings.
So the court in 936 expressly rejected the
same matter on which you're trying to
distinguish and I guess I'm just trying to

1 MISSRY

2 understand why --

3 A. It seems --

4 MR. KOH: Hold on. He hasn't
5 finished the question and I object to
6 it if he had finished it.

7 MR. SCHWARTZ: I'm objecting as
8 well.

9 BY MR. WALSH:

10 Q. I just want to understand how you
11 could have reached that conclusion when
12 the court expressly rejected that same
13 reasoning in its opinion.

14 MR. SCHWARTZ: Same objection.

15 MR. KOH: Same objection. Go
16 ahead and answer.

17 THE WITNESS: I guess my opinion
18 was similar to the two lower courts.
19 My opinion was based upon the language
20 of the provision itself as opposed to
21 a case that was decided by the Court
22 of Appeals. This isn't a net lease,
23 this is a space lease. Is there a
24 distinction? I thought there was a
25 distinction and I thought that at the

MISSRY

time the language in the lease was fairly clear and again, my interpretation was that if there was no specific provision that said that the lease had to be taken into account, it wouldn't be taken into account. That was my interpretation of that provision in case at the time when I gave my opinion in April of 2019. April of 2019, as you know, we agreed I think in July or whenever we -- September, whenever we signed the letter agreement with McDonald's, we did agree at that point in time that the lease can be taken into account and we directed Tom Tener to take it into account.

BY MR. WALSH:

Q. So I just want to back up to something you said earlier in your response when you said this isn't a net lease, this is a space lease. Is there a distinction? I thought there was a distinction.

1 MISSRY

2 A. There's a huge distinction.

3 Q. So what distinction in your
4 opinion can be made from that?

5 MR. KOH: Objection. Go ahead
6 and answer.

7 THE WITNESS: A net lease is
8 typically triple net lease, that's the
9 common parlance where the tenant is
10 responsible for all the costs and
11 expenses of maintaining the property,
12 paying all the real estate taxes,
13 paying all the rent on a net basis so
14 that the landlord is netting whatever
15 the tenant is paying in base rent. A
16 space lease is a traditional lease
17 where you may have a tax stop where
18 the landlord may be responsible for
19 certain repair and maintenance
20 obligations and things of that nature.

21 BY MR. WALSH:

22 Q. How could that difference impact
23 the analysis that the court explained in
24 936 Second Avenue?

25 MR. SCHWARTZ: Objection.

1 MISSRY

2 THE WITNESS: You're asking me --

3 MR. SCHWARTZ: You can answer.

4 THE WITNESS: It impacted my
5 analysis.

6 BY MR. WALSH:

7 Q. I'm trying to understand why did
8 it impact your analysis.

9 A. Because it did, that's my
10 opinion.

11 Q. Can you explain any more than you
12 already have?

13 A. No, I've given you all the
14 explanation --

15 Q. I'm not finished with my
16 question. Can you explain any more than
17 you already have why that distinction
18 impacted your interpretation of the case?

19 A. No.

20 Q. When you reviewed the case on
21 April 1, 2019, did you think that it was a
22 close call or did you think it was black
23 and white, it definitely did not apply?

24 MR. KOH: Objection. You can
25 answer.

1 MISSRY

2 THE WITNESS: I gave my opinion
3 at the time and that was my opinion.

4 BY MR. WALSH:

5 Q. That wasn't my question. My
6 question is whether you thought it was a
7 close call.

8 MR. KOH: Same objection.

9 THE WITNESS: I gave my opinion
10 at that point in time and that was my
11 opinion at that point in time.

12 BY MR. WALSH:

13 Q. I'll ask the question again. Did
14 you think it was a close call?

15 A. I gave my opinion at the time and
16 that was my opinion.

17 Q. Are you refusing to answer my
18 question?

19 MR. KOH: Objection. He's
20 answered it three times.

21 THE WITNESS: I'm answering.
22 You're being belligerent and I'm not
23 going to play your games.

24 BY MR. WALSH:

25 Q. I'm not being belligerent. I'm

1 MISSRY

2 | trying to understand --

3 A. It's irrelevant whether I thought
4 it was close or not.

5 Q. Morris, Morris, let me finish my
6 question. I'm asking you, did you believe
7 it was a close call or did you think the
8 answer was obvious based upon your reading
9 of the case what the answer was?

10 MR. KOH: Same objection.

11 THE WITNESS: I gave you my
12 answer already, Brendan, and I'm not
13 going to play the game. I gave my
14 opinion. I thought that was the
15 proper interpretation and the
16 application of the provision to the
17 case.

18 BY MR. WALSH:

19 Q. Okay, so --

20 A. That's my opinion.

21 MR. WALSH: If we can mark down
22 that area of that question, that's
23 something that we'll call the judge
24 about in a little bit unless you want
25 to answer that question.

1 MISSRY

2 THE WITNESS: I answered the
3 question three times already.

4 BY MR. WALSH:

5 Q. You think it's --

6 A. You're just not satisfied with
7 the answer.

8 Q. You're not answering my question.
9 My question is --

10 MR. KOH: Gentlemen, may I
11 suggest that --

12 MR. WALSH: Howard, I'm in the
13 middle of a question.

14 MR. KOH: No, you're not. You're
15 making a statement. You're arguing
16 with the witness. I'd like you to ask
17 a question and stop arguing with the
18 witness, please.

19 MR. WALSH: I would like the
20 witness to answer my questions.

21 THE WITNESS: I've been answering
22 your questions for several hours now,
23 Brendan. I answered the question
24 whether I thought it was a close call
25 or not a close call. I don't recall

1 MISSRY

2 at the time when I made the analysis
3 but I gave an answer.

4 BY MR. WALSH:

5 Q. So now you're saying you don't
6 recall? Is that your testimony?

7 A. That's my testimony.

8 Q. Okay. That was easy; right?

9 A. Fantastically so.

10 Q. Do you recall if Tom Tener sent
11 you a draft of his report before he
12 formally issued it?

13 A. I don't recall.

14 MR. WALSH: If we could mark
15 VA 018965. It will come up as Exhibit
16 P96.

17 (Exhibit P96, document Bates
18 labeled VA 018965, marked for
19 identification.)

20 BY MR. WALSH:

21 Q. It's a two-page e-mail chain
22 VA 018965 to 966.

23 A. Okay.

24 Q. So this e-mail reflects on April
25 10th, Tom Tener -- April 10, 2019, Tom

MISSRY

Tener sent you with a copy to Sam Rottenberg an e-mail saying that he inspected the property on Monday and ready to finalize our report. Do you have any comments on the draft report? If not I will issue a signed copy for exchange. And you forwarded that e-mail and asked for Sam's input; is that right?

A. It appears so.

Q. Why did you ask for Sam's input?

A. Because when anybody does an appraisal you have to review it for factual consistency. You want to make sure everything is correct in there so that's why you send reports to people to read them to make sure they are factually correct.

Q. If we could pull up what's been previously marked as P32, this is the April 15, 2019 KTR report. This is the letter opinion of value that Tom Tener prepared for the fair market rent valuation under the option rent addendum to the lease; right?

1 MISSRY

2 MR. SCHWARTZ: Brendan, what
3 exhibit are you directing us to?

4 MR. WALSH: P32.

5 MR. SCHWARTZ: Thank you.

6 THE WITNESS: I'm looking at it.
7 Okay.

8 BY MR. WALSH:

9 Q. So my question is: This is the
10 first letter opinion of value that KTR
11 prepared for the fair market rent
12 valuation process on the option rent
13 addendum to the lease; correct?

14 A. Yes.

15 Q. And you reviewed this report when
16 he provided it to you?

17 A. Yes.

18 Q. What, if anything, did you do to
19 confirm that what KTR did in this report
20 complied with the terms of the option rent
21 addendum to the lease?

22 A. Tom was given direction as to
23 what he was supposed to do. He read the
24 terms of the lease, he's a lot more
25 experienced in that than I am. I don't do

1 MISSRY

2 appraisals and so I'm sure I read this. I
3 don't know if I even gave him any
4 comments. I'm not really sure.

5 Q. So the first part of your answer
6 was Tom was given direction.

7 A. Yes.

8 Q. Who gave him that direction?

9 A. I'm sure I did. I sent him a
10 copy or Sam or I sent him a copy of the
11 lease and the addendum and told him that
12 we needed an appraisal in accordance with
13 the terms of this lease.

14 Q. And did you or Sam share your
15 views on the manner in which the option
16 rent addendum required him to prepare his
17 appraisal?

18 MR. SCHWARTZ: Objection. You
19 can answer.

20 THE WITNESS: I think I've
21 already testified to that. Other than
22 giving him my opinion as to taking the
23 lease into account, no.

24 BY MR. WALSH:

25 Q. Okay. So you deferred to Tom

1 MISSRY

2 with the one exception we just discussed,
3 you deferred to Tom's interpretation of
4 the lease as to how he should prepare this
5 valuation?

6 A. Very much so.

7 Q. Same with Vanderbilt?

8 A. Sorry?

9 Q. Same with Vanderbilt?

10 MR. SCHWARTZ: Objection.

11 THE WITNESS: I don't understand
12 the question.

13 BY MR. WALSH:

14 Q. Vanderbilt also deferred to Tom,
15 is that what you're saying?

16 A. I believe we had conversations
17 with Tom about what the lease says. Tom
18 interpreted what the lease says. It was
19 consistent with our reading and then he
20 did his appraisal based upon that.

21 Q. So KTR in this April 15, 2019
22 report used land sales to arrive at a fair
23 market rent valuation. Where in the
24 option rent addendum to the lease does it
25 say land sales can be used to determine

1 MISSRY

2 the fair market rent value? And if you
3 need to look at it, it's P16 is the option
4 rent addendum.

5 MR. KOH: Objection to the
6 question. The witness can answer.

7 MR. SCHWARTZ: Objection.

8 THE WITNESS: Can you repeat the
9 question?

10 BY MR. WALSH:

11 Q. Where in the option rent addendum
12 does it say that land sales can be used to
13 determine the fair market rent value?

14 MR. KOH: Same objection. Go
15 ahead and answer, please.

16 MR. SCHWARTZ: Objection.

17 THE WITNESS: I don't know.
18 You'd have to take a look at the
19 lease.

20 BY MR. WALSH:

21 Q. Well, I'm asking you to. Where
22 in the option rent addendum does it
23 authorize KTR to use comparable land
24 sales?

25 MR. KOH: Objection.

1 MISSRY

2 MR. SCHWARTZ: Objection.

3 THE WITNESS: I don't know what
4 the standard market data approach
5 technique is. I'm not sure. That
6 could be it. I'm not an appraiser, I
7 don't know.

8 BY MR. WALSH:

9 Q. So did you do anything to
10 determine what the standard market data
11 approach technique for valuing vacant land
12 would be?

13 A. Yes.

14 Q. What did you do?

15 A. I hired Tom Tener.

16 Q. Now, the next sentence states,
17 "All comparable leases shall be
18 appropriately adjusted and a written
19 report shall indicate the reasons for the
20 adjustment so made."

21 Is it your professional opinion
22 that those -- that those sentences
23 authorize KTR to value the property using
24 comparable land sales?

25 MR. KOH: Objection. The witness

1 MISSRY

2 may answer.

3 MR. SCHWARTZ: Objection.

4 THE WITNESS: I don't know.

5 BY MR. WALSH:

6 Q. But it doesn't mention comparable
7 land sales but does mention comparable
8 leases; isn't that right?

9 A. It says the standard market data
10 approach technique for valuing vacant land
11 shall be used by the appraisers.

12 Q. How about the next sentence?

13 A. That just refers to leases.
14 There's a lot of disjointed language in
15 this provision so I don't know.

16 Q. Are you aware of any language
17 that specifically authorizes KTR to use a
18 land sales comparison approach?

19 MR. KOH: Objection. The witness
20 may answer.

21 THE WITNESS: I would assume that
22 that's one of the ways that appraisers
23 value land is they compare sales.

24 BY MR. WALSH:

25 Q. Do you believe that KTR complied

1 MISSRY

2 with the terms of the option rent addendum
3 by using the method he used in the April
4 15, 2019 report?

5 A. I have full faith in Tom Tener.
6 We were asked to change the appraisal by
7 McDonald's to include the lease as
8 encumbrance which he subsequently did.

9 Q. So my question was do you believe
10 KTR complied with the terms of the option
11 rent addendum by using the method used in
12 the April 15, 2019 report?

13 A. You'd have to ask Tom Tener that
14 question.

15 Q. Well, I'm asking what you
16 believe.

17 MR. KOH: Objection. Go ahead
18 and answer.

19 THE WITNESS: Again, we hired Tom
20 to do this work so we assumed that he
21 did it properly.

22 BY MR. WALSH:

23 Q. That's not my question. Do you
24 believe he did it in accordance with the
25 terms of the option rent addendum to the

1 MISSRY

2 lease?

3 MR. KOH: Objection. You're
4 assuming a fact that's not necessarily
5 in evidence, mainly did he have a
6 belief. Go on.

7 THE WITNESS: I don't really know
8 how to answer that question.

9 BY MR. WALSH:

10 Q. You don't believe you can answer
11 whether you believe that Tom Tener
12 complied with the terms of the option rent
13 addendum?

14 A. I believe that Tom did what he
15 believed was the correct analysis.

16 Q. What do you believe was the
17 correct analysis?

18 MR. KOH: Objection. Go ahead
19 and answer if you can.

20 THE WITNESS: I believe what Tom
21 Tener did was correct.

22 BY MR. WALSH:

23 Q. And do you believe that what Tom
24 Tener did complied with the terms of the
25 option rent addendum to the lease?

1 MISSRY

2 MR. KOH: Objection.

3 MR. SCHWARTZ: Objection.

4 MR. KOH: You can answer.

5 THE WITNESS: I don't know but I
6 do believe so.

7 BY MR. WALSH:

8 Q. Did you have any discussions with
9 KTR about what comparable leases they used
10 in their April 15, 2019 analysis?

11 MR. KOH: Objection. Go ahead
12 and answer.

13 THE WITNESS: I think we had -- I
14 think the answer is yes. I believe we
15 had a meeting with McDonald's and
16 their appraiser and I believe that
17 McDonald's appraiser and Tom reviewed
18 the leases that they were using for
19 comparison purposes.

20 BY MR. WALSH:

21 Q. Well, my question is a little bit
22 different. The option rent addendum says
23 all comparable leases shall be
24 appropriately adjusted. What I'm
25 wondering is whether you had any

1 MISSRY

2 discussions with KTR about what comparable
3 leases it used in its analysis?

4 MR. KOH: Objection. Go ahead
5 and answer.

6 MR. SCHWARTZ: Objection.

7 THE WITNESS: I don't recall.

8 BY MR. WALSH:

9 Q. Do you know if KTR used
10 comparable leases in its analysis April
11 15, 2019?

12 A. Let me go back to their report.
13 Do you know which number it was?

14 MR. KOH: 32, I believe.

15 BY MR. WALSH:

16 Q. P32.

17 A. FMV determination on page, let's
18 see, page 3 of their appraisal, they say
19 they analyzed the economic terms of
20 relevant ground leases in Brooklyn, Queens
21 and Manhattan.

22 Q. Did you speak with Tom around
23 this time about those what he calls
24 relevant ground leases?

25 A. I was talking to Tom and Sam

1 MISSRY

2 throughout a process so I don't remember
3 what we discussed specifically.

4 Q. Do you recall if Tom Tener or
5 anyone else at KTR told you that those
6 were comparable ground leases?

7 A. I don't recall. He was the one
8 who was doing the research so I don't know
9 what value I could have added.

10 Q. So in the second full paragraph
11 on page 2 of KTR's report, it states that
12 "The FMV of the demised premises is a
13 function of the market value of the
14 subject land and the ground rent
15 percentage that an average well-informed
16 tenant would pay and an average
17 well-informed landlord would accept,
18 exclusive of tenant's improvements,
19 knowing all the uses to which the property
20 can be put, without duress on either
21 party."

22 Do you see that?

23 A. I do.

24 Q. So the second part of that
25 sentence beginning with an average

1 MISSRY

2 well-informed tenant is a quote from the
3 option rent addendum to the lease, but the
4 first part of that sentence is not taken
5 from the lease. Did you ever discuss with
6 Tom where he got that language that he
7 used in that portion of his report?

8 A. I don't recall.

9 Q. Does the option rent addendum say
10 anywhere that the fair market rental value
11 is a function of the market value of the
12 subject land and the ground rent
13 percentage?

14 MR. KOH: Objection. Go ahead
15 and answer.

16 THE WITNESS: What exhibit is it?

17 BY MR. WALSH:

18 Q. P16.

19 A. Fair market rental value
20 exclusive -- let's see. The rental value
21 shall be established based upon definition
22 of fair market rental value as the price
23 which a well-informed tenant would pay. I
24 don't see his language in here if that's
25 the question.

1 MISSRY

2 Q. Did you ever ask KTR where that
3 came from?

4 A. I don't recall. We'd have to
5 look up the definition of fair market
6 rental value. I don't know where it is.

7 Q. Well --

8 A. Probably somewhere in the lease
9 though. What copy, where's the lease?

10 Q. I believe it's P69. But I think
11 if you look at the option rent addendum,
12 the second page says upon a definition of
13 fair market rental value as and goes on to
14 state what the definition of fair market
15 rental value is. So I'm not sure where
16 that -- we need to look at the rest of the
17 lease.

18 MR. WALSH: If we can mark
19 VA 024565.

20 (Exhibit P97, document Bates
21 labeled VA 024565, marked for
22 identification.)

23 BY MR. WALSH:

24 Q. This is a multi-page e-mail chain
25 ending in VA 024568.

1 MISSRY

2 A. Okay.

3 Q. So this is an e-mail exchange
4 between you and Tom Tener at least on the
5 first page from April 15, 2019 which is
6 the date of the report we were just
7 looking at. And on the bottom, it says,
8 "We are actually in contact with McDonalds
9 about setting up a meeting the week of the
10 29th. Will you be available?"

11 Do you recall what you were
12 trying to set up a meeting with McDonald's
13 about?

14 A. Yeah, we were trying to contact
15 McDonald's to negotiate a rent re-set and
16 it was extremely frustrating trying to get
17 in contact with them so we were trying to
18 set up a meeting in my office to start a
19 process of negotiating a new rent for the
20 renewal term.

21 Q. In the top e-mail it says, "We
22 are notifying McDonalds that we designated
23 you," referring to Tom Tener, "as our
24 appraiser so if Sharon happens to reach
25 out to you please do not discuss

1 MISSRY

2 valuations at all."

3 Why did you not want Tom speaking
4 with Sharon about valuations?

5 MR. KOH: Objection.

6 THE WITNESS: Because the option
7 term addendum doesn't permit the
8 parties to exchange valuation. They
9 are required to issue letters of
10 opinion of value and I didn't want Tom
11 to do anything that would violate that
12 provision.

13 BY MR. WALSH:

14 Q. Do you recall why your firm
15 ultimately retained KTR instead of BBG or
16 one of the other appraisers that you
17 interviewed?

18 A. Not specifically.

19 Q. And who made the decision to
20 retain KTR, was that you or Sam
21 Rottenberg?

22 MR. KOH: Objection. You can
23 answer.

24 THE WITNESS: We discussed it and
25 we thought Tom was the best choice.

1 MISSRY

2 It's Sam's ultimate decision.

3 BY MR. WALSH:

4 Q. I want to fast forward to a
5 meeting that took place on June 19, 2019
6 between the parties and their appraisers.
7 Do you recall that meeting?

8 A. I recall a meeting that we had
9 with Sharon, Tom, Sam, I'm not sure if
10 Mike was there or on a phone call. Carol
11 Demarco I think was there but I do recall
12 the meeting.

13 Q. And what was the purpose of that
14 meeting?

15 A. The purpose of the meeting was to
16 discuss each party's findings to see if we
17 can find common ground so that we would
18 obviate the need to hire a third appraiser
19 and come to some type of value
20 proposition.

21 Q. Now, in advance of that meeting,
22 did you have any communications with KTR
23 about the encumbrance of the lease issue,
24 other than the communications that you had
25 with KTR on April 1st that we reviewed

1 MISSRY

2 earlier?

3 A. I don't recall.

4 Q. And how about with Vanderbilt?

5 A. I don't recall.

6 Q. What happened first at that
7 meeting, do you remember which party went
8 first and what was said?

9 A. I think Sharon went first. She
10 was super aggressive, if I recall
11 correctly, and then I believe Tom gave his
12 opinion and it seemed like the parties
13 were so way off. That's what I remember
14 about the meeting.

15 Q. And do you recall any objections
16 to the KTR report that McDonald's raised?

17 A. I'm not sure. There could have
18 been. I think both parties objected to
19 the other's findings and basis for
20 computing their fair market rent
21 determination or value determinations. I
22 think Sharon was using pad leases for fast
23 food restaurants in Queens and banks and
24 Tom didn't think that was appropriate. I
25 thought Sharon admitted to Tom that he was

1 MISSRY

2 probably right but again, it was -- I
3 don't think the meeting went well.

4 Q. Do you recall screaming at anyone
5 at that meeting?

6 A. I may have. Sharon Locatell was
7 extremely aggressive, disrespectful and
8 obnoxious so if someone acts like that, I
9 definitely could have screamed at her.

10 Q. Do you believe that you were
11 extremely aggressive, disrespectful,
12 obnoxious or something else?

13 MR. SCHWARTZ: I'm going to
14 object but he can answer. Go ahead.

15 THE WITNESS: Absolutely not.

16 BY MR. WALSH:

17 Q. So in your opinion only Sharon
18 was?

19 A. Oh, I know Sharon was.

20 Q. Did you take notes at the
21 meeting?

22 A. I believe I did and I think I
23 turned them over to Warren.

24 Q. You turned them over to who?

25 A. To Howard, sorry, Warren.

1 MISSRY

2 Q. If we could pull up P34.

3 Do you have the document pulled
4 up?

5 A. I do.

6 Q. Are these your notes from the
7 June 19, 2019 meeting with McDonald's and
8 the appraisers?

9 A. Yes.

10 Q. And this is all your handwriting
11 here?

12 A. It is.

13 Q. So I would just like to go
14 through these notes with you. Up at the
15 top it says TT and then there are some
16 numbers. Are you able to read what that
17 says?

18 A. First, I want to object because I
19 think it's totally inappropriate that my
20 internal notes would make it into this
21 proceeding. So I know Dani objected
22 before but to me this is attorney/client
23 privilege and I just want to go on the
24 record as saying that.

25 Yes, TT is Tom Tener and I think

1 MISSRY

2 I wrote 1,348,000 as his fair market value
3 determination.

4 Q. And that's written first so it
5 looks like maybe Tom spoke first?

6 MR. KOH: Objection.

7 THE WITNESS: I may have just
8 made a notation because I knew what
9 Tom's findings were before Sharon
10 started in.

11 BY MR. WALSH:

12 Q. Okay. And then it says -- does
13 that say Sharon Locatell underneath?

14 A. It does.

15 MR. KOH: Somebody needs to go on
16 mute.

17 MR. WALSH: Do you know who's
18 talking in the background?

19 MR. KOH: I think it's been
20 fixed.

21 BY MR. WALSH:

22 Q. And what does it say directly
23 below Sharon Locatell?

24 A. It looks like I wrote extreme
25 difference.

1 MISSRY

2 Q. And how about right below that?

3 A. FMV rent determination for a
4 five-year lease.

5 Q. How about below that?

6 A. As opposed to a 20-year lease.
7 12 leases, banks, coffee shops.

8 Q. And then does it say 350,000 per
9 year times 20 percent?

10 A. 275.

11 Q. And then it says, Mike believes
12 lease has to be considered in the
13 appraisal?

14 A. Yes.

15 Q. What do you recall about that
16 part of the conversation?

17 MR. SCHWARTZ: Objection.

18 THE WITNESS: Nothing.

19 BY MR. WALSH:

20 Q. So what does it mean Mike
21 believes lease has to be considered in the
22 appraisal?

23 A. It means Mike believes that the
24 lease has to be considered in the
25 appraisal.

1 MISSRY

2 Q. What else was Mike saying, do you
3 recall what his position was?

4 A. I don't recall.

5 Q. Do you recall if he brought up
6 the 936 Second Avenue case?

7 A. I don't recall.

8 Q. And you don't recall anything
9 about why he was taking that position?

10 A. I am not sure if Mike and I --
11 I'm sure Mike and I spoke beforehand and
12 he probably conveyed that sentiment to me.
13 Actually, this could have been the first
14 time he mentioned it. I'm not really
15 sure. If there's e-mails between us, then
16 maybe you can tell us.

17 Q. What was your response to Tom's
18 comment that the lease has to be
19 considered in the appraisal?

20 MR. KOH: Objection. Go ahead.

21 THE WITNESS: I don't think Tom
22 made a comment.

23 BY MR. WALSH:

24 Q. What was your response?

25 A. To who?

1 MISSRY

2 MR. SCHWARTZ: Objection.

3 BY MR. WALSH:

4 Q. To Mike's comment that he
5 believed the lease has to be considered in
6 the appraisal.

7 A. I don't recall.

8 Q. Now this was the same issue that
9 Tom Tener had raised with you on April 1,
10 2019; right?

11 A. Apparently.

12 Q. Was it or wasn't it?

13 A. I'm reading off notes, you know.
14 There's no specifics here. I'm assuming
15 it's the same issue.

16 Q. It seems to be the same issue;
17 right?

18 A. It seems to be.

19 Q. Okay. And so given that Mike
20 Meyer from McDonald's was saying this and
21 Tom Tener had brought this up to you a
22 couple months earlier, you didn't have any
23 reaction to his statement?

24 MR. KOH: Objection. Go ahead
25 and answer.

1 MISSRY

2 THE WITNESS: Tom had already
3 done his appraisal, this was a
4 settlement discussion. Another reason
5 why I'm shocked that this got out so
6 it's wholly inappropriate to discuss
7 what we discussed at that settlement
8 negotiation. But I don't recall how I
9 reacted to what Mike said. I know I
10 took down the note.

11 BY MR. WALSH:

12 Q. There's something in parentheses
13 or I guess what does it say underneath
14 Mike believes lease has to be considered
15 in the appraisal?

16 A. Sharon only considered comparable
17 leases. \$12 per square foot land value.

18 Q. And how about underneath that?

19 A. 11 outer borough comps, five to
20 six in Brooklyn and Queens, 15-year to
21 20-year renewals, one five-year, bank,
22 Starbucks, McDonald's, 20K to 30K square
23 feet, totally different methodology.

24 Q. How about the next line?

25 A. Lease comps versus property

1 MISSRY

2 comps. I don't even know what all that
3 means.

4 Q. And how about in the top of the
5 next page, it seems to say rental
6 determination based upon a five-year
7 renewal term. Do you see that?

8 A. Rental determination based
9 upon -- yeah. Yes, I do know what that
10 means.

11 Q. Who said that?

12 A. Sharon's analysis for all of
13 these comparable leases was based upon a
14 five-year term as opposed to a 20-year
15 term which McDonald's exercised.

16 Q. So you believe McDonald's
17 exercised a 20-year term?

18 MR. KOH: Objection.

19 THE WITNESS: They did exercise a
20 20-year term.

21 BY MR. WALSH:

22 Q. What is that opinion based upon?

23 A. The lease. There are automatic
24 renewals and the only thing that's
25 determined is the rent during the 20-year

1 MISSRY

2 extension terms.

3 Q. So you believe that they had
4 exercised a 20-year term?

5 A. Absolutely.

6 Q. How about on the next line down,
7 (inaudible) ground lease.

8 A. I can't read the penultimate word
9 there. I don't know. I don't know what
10 that says right now.

11 Q. Okay. How about further down, it
12 looks like it says exchange comps.

13 A. Yeah.

14 Q. What does it say underneath that?

15 A. Tom Tener said the fundamental
16 flaws that their appraisal focuses on pad
17 sites and Sharon agreed with that
18 analysis. Our site can build 22,000
19 square feet of retail, can build multiple
20 stories and basements.

21 Q. So did Tom Tener who said that
22 the site can build 22,000 square foot of
23 retail?

24 A. Yeah.

25 Q. Do you recall if anyone from the

1 MISSRY

2 The specifics I'd have to go through
3 e-mails and notes to -- or e-mails to
4 recreate what happened next. I think in
5 July we started having more discussions.
6 I asked Tom to consider preparing an
7 updated appraisal. Mike was insistent
8 that we take the lease into account. So
9 again, we were trying to work together
10 cooperatively with McDonald's so one of
11 the ideas I floated by Tom was to redo the
12 appraisal and to take the lease into
13 account to accommodate their concern.

14 Q. I want to talk a little bit about
15 that because I think you misunderstood my
16 question. My question was what
17 discussions do you recall with KTR after
18 the meeting with McDonald's?

19 A. I don't recall.

20 Q. Do you recall Tom Tener
21 performing calculations on his calculator
22 that day?

23 A. I don't recall.

24 Q. Do you recall Tom telling you
25 around that time that he believed the land

1 MISSRY

2 residual analysis would result in
3 approximately the same value?

4 A. During what time?

5 Q. Right around the time of that
6 meeting, June 19, 2019.

7 A. No.

8 Q. Did you tell Tom Tener that day
9 that you agreed with McDonald's about the
10 applicability of the 936 Second Avenue
11 case?

12 A. Sorry, can you repeat that?

13 Q. Did you tell Tom Tener that day
14 that you agreed with McDonald's about the
15 applicability of the 936 Second Avenue
16 case?

17 A. I don't recall.

18 Q. Do you recall ever telling Tom
19 Tener that you agreed with McDonald's
20 about the applicability of the 936 Second
21 Avenue case?

22 A. I could have told him down the
23 road but I don't recall a specific
24 discussion.

25 Q. So do you now agree with

1 MISSRY

2 McDonald's that the 936 Second Avenue case
3 and the lease requires the encumbrances
4 including the lease to be factored into
5 the fair market rent valuation
6 calculation?

7 MR. KOH: Objection. The witness
8 can answer.

9 MR. SCHWARTZ: Objection.

10 THE WITNESS: Vanderbilt agreed
11 with McDonald's that their appraiser,
12 Tom Tener, would redo the -- his
13 appraisal taking the lease into
14 account.

15 BY MR. WALSH:

16 Q. My question was actually
17 different. Do you now agree that the case
18 and the lease requires the encumbrance of
19 the lease to be considered in the
20 valuation?

21 MR. KOH: Objection. The witness
22 may answer.

23 MR. SCHWARTZ: Objection.

24 THE WITNESS: It's a great
25 question. I still have my doubts as

MISSRY

to what a court would hold because of the language, because I do believe that the option term addendum is not clear. I do see McDonald's perspective on why the lease should be included and I do see the other side of the coin as well. So -- but for the purposes of again trying to work things out, we took the approach that the lease would be taken into account in Tom having to do a revised, if you will, appraisal.

BY MR. WALSH:

Q. And who made that decision?

A. We conferred and again, the ultimate decision is the client's as you know.

Q. So Sam Rottenberg made that decision?

MR. KOH: Objection. Go ahead.

THE WITNESS: Sam Rottenberg in consultation with myself and probably Tom Tener made that decision.

///

1 MISSRY

2 BY MR. WALSH:

3 Q. And do you recall when that
4 decision was made?

5 A. I believe the decision to redo
6 the appraisal was made sometime in July of
7 '19 but it took the better part of a month
8 and a half, two months to get McDonald's
9 to agree to a non-prejudicial letter that
10 would allow the appraisers to hire the
11 third appraiser and proceed down the path
12 of getting that person's opinion of value.

13 Q. Now in the course of deciding
14 whether to take the encumbrance of the
15 lease into account in KTR's analysis, did
16 you consult with anyone other than
17 Vanderbilt or Tom Tener?

18 A. Other than possibly a partner or
19 two, no.

20 Q. Do you recall if you did
21 additional research?

22 A. I don't recall, no.

23 Q. Now, when you made the decision
24 -- or when Vanderbilt made the decision to
25 have Tom revise his analysis, had your

1 MISSRY

2 view on the applicability of the case
3 changed; in other words, did you feel
4 differently about the case at that point
5 in time than you did when you read it in
6 April of 2019?

7 A. I saw -- as I mentioned before, I
8 saw McDonald's perspective and for the
9 purposes of trying to move the ball
10 forward, we agreed with their
11 interpretation.

12 Q. So the only reason you agreed
13 with the interpretation was to try to move
14 the ball forward and not because
15 Vanderbilt believed it was correct?

16 MR. SCHWARTZ: Objection. You
17 can answer.

18 MR. KOH: Objection. Go ahead
19 and answer.

20 THE WITNESS: I think the case
21 speaks for itself. The case stands
22 for the theory that absent an express
23 statement in the lease, excluding
24 taking that particular lease into
25 account, that you shouldn't. It was

MISSRY

our belief beforehand that there was language that was tantamount to doing that but again, we always look at different perspectives. If we're wrong, we're happy to say we're wrong. I don't know how the case, how our particular case would turn out but again, we agreed with their interpretation as a concession to moving forward because they wouldn't move forward with appointing another appraiser unless we did.

BY MR. WALSH:

Q. Do you recall what specific instructions you or Vanderbilt made to Tom Tener to revise his original analysis?

A. The only instructions we would have given Tom is to take the lease into account.

Q. Did you or Vanderbilt suggest that he look for comparable ground leases?

A. I don't recall. I would leave Tom to doing his thing. He's the professional.

1 MISSRY

2 Q. When Vanderbilt instructed Tom
3 Tener to proceed to revise his analysis,
4 had KTR shared with you that it believed
5 its valuation conclusion would be
6 approximately the same even if he
7 considered the encumbrance to the lease?

8 A. Can you repeat that?

9 Q. Sure.

10 When Vanderbilt instructed KTR to
11 proceed to revise its analysis, had anyone
12 at KTR shared with you that it believed
13 its valuation conclusion would be
14 approximately the same as its original
15 valuation conclusion even if it considered
16 the encumbrance to the lease?

17 MR. SCHWARTZ: Objection.

18 THE WITNESS: I don't know that I
19 said that Vanderbilt directed. I
20 think we collectively did. And I
21 don't think we knew what his analysis
22 was before he did the work so I don't
23 think so.

24 MR. WALSH: If we could just take
25 a five-minute break. I think now

1 MISSRY

2 would be a good time to take a quick
3 break and we can come right back if
4 that's okay with everyone.

5 MR. KOH: It's okay with me.

6 THE VIDEOGRAPHER: Going off the
7 record at 2:17 p.m. This is the end
8 of media unit 3.

9 (Recess taken from 2:18 p.m. to
10 2:29 p.m.)

11 THE VIDEOGRAPHER: Going back on
12 the record, 2:29 p.m. This is
13 beginning of media unit 4. Okay, you
14 may proceed.

15 BY MR. WALSH:

16 Q. Okay, if we can please pull up
17 P62. So this is an e-mail from Tom Li --
18 or an e-mail chain between Tom Li, Tom
19 Tener, Sam Rottenberg and Morris Missry
20 from July 2019. You tell me when you have
21 it up.

22 A. I'm looking at it.

23 Q. So if you could flip to the
24 second page, the bottom e-mail from July
25 9, 2019, 9:49 a.m. from Tom Tener to you

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2 and Sam Rottenberg, he says, other than
3 some preliminary analysis, I have not
4 begun the land residual. I will not be
5 able to start with the land residual until
6 sometime during the week of July 22nd. If
7 you have confirmed details of any retail
8 lease comparables in this area, please
9 send them to me. Comparable leases in the
10 90 to \$100 per square foot range, about
11 \$75 NNN, that's triple net, would support
12 our concluded FMR for a 20-year term. Do
13 you see this?

14 A. I see it.

15 Q. What discussions did you have
16 with Tom around this time about what he
17 should be doing and how he should be
18 revising his analysis at all?

19 A. The only thing I recall is
20 telling him that we're negotiating a
21 letter agreement with McDonald's and that
22 he should start -- he should start on
23 revising his appraisal based upon the
24 assumption that the lease is an
25 encumbrance.

1 MISSRY

2 Q. So this e-mail that we just read
3 was July 9, 2019. So you agree you had
4 given him those instructions sometime
5 before July 9, 2019?

6 A. In all likelihood, yeah.

7 Q. Now, the first page, bottom
8 e-mail, it's a July 23, 2019 e-mail from
9 Tom Tener to you and Sam Rottenberg. It
10 says, I have built the model for a land
11 residual that my staff is researching rent
12 comps in the area. I think that both you
13 and Morris mentioned at the McDonald's
14 meeting that you have knowledge of retail
15 lease comps in the \$100 per square foot
16 range in this area.

17 Does this refresh your
18 recollection about what you discussed with
19 Tom Tener on the day of the McDonald's
20 meeting?

21 A. No.

22 Q. Okay. So he talks about that you
23 may have mentioned retail lease comps,
24 \$100 per square foot range. What, if
25 anything, do you recall about that?

1 MISSRY

2 A. I don't recall anything specific.

3 Q. Do you think you would have been
4 knowledgeable of retail lease comps in the
5 \$100 per square foot range in that area?

6 MR. KOH: Objection.

7 THE WITNESS: I think I would
8 have knowledge of retail comps way
9 above \$100 per square foot.

10 BY MR. WALSH:

11 Q. In that area?

12 A. On Fulton Street, yeah.

13 Q. If we could please pull up P36,
14 this is the July 30, 2019.

15 A. P36?

16 Q. Yes.

17 A. Here it is. Okay.

18 Q. So this is his revised analysis
19 dated July 30, 2019. And he came to the
20 same value conclusion. Were you surprised
21 to learn that he had arrived at the same
22 exact fair market rent valuation as he did
23 in his prior report?

24 A. Just give me a second. I'm
25 looking at it.

1 MISSRY

2 (Witness perusing document.)

3 What was the question? I'm
4 sorry.

5 Q. Were you surprised to learn that
6 KTR had arrived at the same exact fair
7 market rent valuation as they did in its
8 original report?

9 A. No.

10 Q. Why?

11 A. I thought that the analysis that
12 he did on the land residual was very
13 sound. I think it was conservative to
14 assume market rent of 90 to \$100 when, you
15 know, I've been involved in leases that
16 are way higher than that, although down
17 the block. So I thought his analysis was
18 conservative but again, it was his
19 analysis.

20 Q. Okay. So a very experienced real
21 estate professional, I think you said
22 before that you're even a real estate
23 investor. Is it your opinion that a
24 sophisticated and knowledgeable investor
25 would pay the exact same amount for a

1 MISSRY

2 property that it could own in perpetuity
3 and then sell, that it would pay for a
4 parcel where it can only benefit for a
5 defined 20-year period of time with no
6 reversion interest?

7 MR. KOH: Objection. You may
8 answer the question.

9 MR. SCHWARTZ: Objection.

10 THE WITNESS: I think that there
11 is a flaw in that analysis; right?
12 You said before that that Sam owned a
13 99-year lease. So a 99-year lease --
14 and you also said that he was going
15 to -- he had to pay his landlord what
16 he collected from McDonald's or some
17 differential if he didn't hit a
18 certain amount by a certain date. I
19 think that's what you said. So no, I
20 wouldn't be surprised that somebody
21 would pay an amount of money for 79
22 years or whatever the amount of the
23 term, the residual term was on the
24 lease, when it didn't have to pay a
25 purchase price. So no, I wasn't

1 MISSRY

2 shocked by this at all.

3 BY MR. WALSH:

4 Q. I think you're talking about
5 something different. Tom in his revised
6 analysis was assuming that the property
7 could only be used for 20 years; right?

8 MR. SCHWARTZ: Objection.

9 MR. KOH: Objection. Go ahead
10 and answer.

11 THE WITNESS: He was doing a
12 valuation based upon a 20-year option
13 period.

14 BY MR. WALSH:

15 Q. Right. And his original analysis
16 was essentially with no time restriction;
17 right? What would the property be worth
18 if it could be used with no time
19 restriction; right?

20 A. Yeah, but when you're doing an
21 analysis, it's really, you don't -- the
22 analysis is based upon generally a 10-year
23 period. He ran it out to 20 years. If
24 I'm buying a property, I do my analysis
25 based upon what I'm going to be collecting

1 MISSRY

2 in 10 years and I cap it out. So he used
3 20 years because that was the term of the
4 lease.

5 Q. Right. But when you say you
6 would look at it in 10 years, you would
7 also factor in a reversion, the value of
8 the reversion interest back to after 10
9 years; right?

10 MR. KOH: Objection. You may
11 answer.

12 THE WITNESS: I don't really know
13 where you're going with this. This is
14 his analysis. I'm not here to quibble
15 with his analysis. He's the expert,
16 I'm not.

17 BY MR. WALSH:

18 Q. Well, I'm asking for your
19 opinion. Do you believe that a property
20 that can be owned or developed in
21 perpetuity would be worth the same amount
22 that a property could only be used for a
23 period of 20 years?

24 MR. KOH: Objection. You may
25 answer.

1 MISSRY

2 THE WITNESS: I think the
3 property that can be operating in
4 perpetuity would have a greater value
5 but I don't know that that was the
6 analysis here.

7 BY MR. WALSH:

8 Q. Okay, so --

9 A. He's analyzing -- I think he's
10 analyzing the rent and what the rent
11 should be on a 20-year lease.

12 Q. So KTR's revised report is dated
13 July 30, 2019. When did you tell
14 McDonald's that you would have KTR prepare
15 a new report?

16 A. I don't know when Michael and I
17 started discussing the concept of doing
18 new reports and meeting again and trying
19 to figure it out again. I'm not sure.

20 MR. WALSH: If we could mark
21 MCD007663 as Exhibit P98.

22 MR. SCHWARTZ: P98 did you say?

23 MR. WALSH: Yes.

24 (Exhibit P98, document Bates
25 labeled MCD007663, marked for

1 MISSRY

2 identification.)

3 BY MR. WALSH:

4 Q. So this is an e-mail chain
5 between you and Mike Meyer from McDonald's
6 on August 28, 2019. It spans through
7 Bates stamp MCD007665.

8 A. Yeah.

9 Q. So does this refresh your
10 recollection about when you would have
11 told Mike Meyer that you would have KTR
12 prepare a new report?

13 A. No.

14 Q. Do you recall what you wanted to
15 speak with Mike about at this time?

16 A. No idea.

17 Q. Had you received KTR's report by
18 the time -- revised report by the time you
19 told McDonald's that you would have KTR
20 prepare a new report?

21 MR. KOH: Objection.

22 THE WITNESS: I don't know.

23 Possibly. It took us a couple months
24 I think to negotiate the terms of the
25 letter agreement so it's possible.

1 MISSRY

2 BY MR. WALSH:

3 Q. Okay. Now, if a report had
4 already been prepared in a revised manner,
5 why wouldn't you have told McDonald's
6 that?

7 MR. KOH: Objection. Go ahead
8 and answer.

9 THE WITNESS: Why wouldn't I have
10 told McDonald's that? There could be
11 a whole host of reasons. I don't
12 know.

13 BY MR. WALSH:

14 Q. But you told McDonald's at some
15 point after the June 19, 2019 meeting that
16 you would instruct KTR to redo its
17 analysis by taking into account the
18 encumbrance of the lease; is that right?

19 A. Yes, and I wanted to have a
20 letter agreement with McDonald's signed
21 that laid out a procedure. In return for
22 us agreeing to redo the appraisal, we
23 wanted McDonald's to agree to a process
24 because they were forestalling that
25 process with the third appraiser, they

1 MISSRY

2 wouldn't retain him. So we wanted a
3 letter agreement with them that provided
4 for the retention of the third appraiser,
5 for everyone to redo their appraisal
6 without prejudice, et cetera, et cetera.
7 So we wouldn't have given McDonald's any
8 revised appraisals until we had a letter
9 agreement setting forth the procedure
10 going forward and it took them two or
11 three months to get that done.

12 Q. If we could please pull up P87.

13 A. Okay.

14 Q. So this is an e-mail exchange
15 between you, Tom Tener and Sam Rottenberg
16 from early September 2019. And Tom Tener
17 attached a redlined Word document that is
18 attached. Now is this the draft agreement
19 that you were discussing with McDonald's
20 at the time?

21 A. One of them.

22 Q. Okay. And by the way, is this
23 one of the documents that Vanderbilt's
24 counsel sent to you in advance of today's
25 deposition?

1 MISSRY

2 A. Yeah, the signed copy.

3 Q. But not this draft?

4 A. I don't think so.

5 Q. So one of the edits that -- if
6 you could turn to the first page of the
7 redline.

8 A. Sure.

9 Q. The first numbered paragraph, one
10 of the edits Tom Tener proposed making in
11 bullet one was he was recommending to
12 strike the language in the agreement that
13 would have the appraisers estimate the
14 value of the property as encumbered by the
15 lease.

16 Do you see that?

17 A. I do.

18 Q. And do you recall why he made
19 that suggestion?

20 MR. KOH: Objection.

21 MR. SCHWARTZ: Same objection.

22 THE WITNESS: I don't.

23 BY MR. WALSH:

24 Q. Do you recall if you asked him?

25 A. If I asked him to make that

1 MISSRY

2 change?

3 Q. Or no, do you recall if you asked
4 him why?

5 A. No, I don't recall.

6 MR. WALSH: If we could mark
7 VA 034179, this is the signed copy of
8 the agreement in 2019.

9 (Exhibit P99, document Bates
10 labeled VA 034179, marked for
11 identification.)

12 THE WITNESS: Okay, what exhibit?

13 MR. WALSH: It should be P --

14 MR. KOH: 99.

15 BY MR. WALSH:

16 Q. -- 99.

17 A. Okay.

18 Q. So this is the final copy of the
19 letter and the change that Tom suggested
20 was made so that language that would have
21 required the appraisers to estimate the
22 value of the property as encumbered by the
23 lease was ultimately removed as Tom had
24 suggested. Do you recall why that
25 language was removed?

1 MISSRY

2 A. Yes.

3 Q. And why?

4 A. It was removed because both
5 parties did not want to waive any of their
6 rights, any of the positions that they
7 previously took so we try to craft a
8 letter that was as non-prejudicial as
9 possible. And if you take a look at
10 paragraph 2, you'll see that the second
11 sentence does that.

12 Q. But at this point, if you had
13 already agreed to have Tom revise his
14 analysis to consider the encumbrance of
15 the lease, why would you have included it
16 in this agreement?

17 MR. KOH: Objection.

18 MR. SCHWARTZ: Objection. Go
19 ahead.

20 THE WITNESS: Because I already
21 told him to and there was no reason to
22 put it in what is best the settlement
23 negotiation letter with McDonald's.

24 It was academic at that point in time.

25 ///

1 MISSRY

2 BY MR. WALSH:

3 Q. By the time you executed that
4 letter in September of 2019, had you
5 agreed or had Vanderbilt agreed that if a
6 third appraiser was retained, that
7 appraiser would also be instructed to
8 value the rent as encumbered by the lease?

9 A. I don't -- I don't recall.

10 Q. I know back in probably the
11 April/May 2019 time frame Sharon and Tom
12 Tener had some discussions about a search
13 for a third appraiser. What role, if any,
14 did you play in the search for a third
15 appraiser?

16 A. I think we asked Tom his opinion
17 on different appraisers and he gave us his
18 opinion and I think he brought up probably
19 three or four different people. I think
20 Marc was the last person he brought up and
21 I guess he discussed all of these with
22 Sharon, that's what he told me, and they
23 agreed to Marc who I don't know from a
24 hole in the wall.

25 Q. What was Vanderbilt looking for

1 MISSRY

2 in a third appraiser?

3 A. Vanderbilt was looking for a
4 third appraiser to do a letter of opinion
5 of value. Period, end of story. They
6 didn't really care who it was, they just
7 wanted to get their rent paid and
8 McDonald's was delaying the process since
9 January. So at that point in time, they
10 were happy with anybody that Sharon
11 reached out to.

12 Q. If we could pull up P37. It's an
13 e-mail chain between you and Sam
14 Rottenberg and Tom Tener from April 2019.

15 A. P what, 37?

16 Q. P37. If you could look at the
17 bottom of the second page, it's ending in
18 VA 019026. It's an e-mail from Tom Tener
19 to you dated April 23, 2019.

20 A. Okay.

21 Q. And Tom says that he's going to
22 be speaking with Sharon Locatell tomorrow
23 to go over the logistics of this FMR
24 determination and begin a discussion about
25 the selection of a third appraiser.

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Other than the appraisers that you listed before, do you recall if you spoke with any other appraisers or if you had any other appraisers that you did not want to be considered?

A. As the third appraiser?

Q. Yes.

A. I see here that I said not Amanda because I didn't think Amanda was qualified for this particular job but no, we were -- we were, Vanderbilt and me, were really relying on Tom to pick someone that he liked and to get that person approved by Sharon. We were sort of agnostic as to who it was.

Q. So if you could just scroll up through those e-mails and you mentioned that Tom was going to give you a list of his top three or four guys and asked him to send a list and then he tells you who he's contemplating, he puts out some additional names. And then on April 25, 2019 at 1:18 p.m. you wrote to him with a copy to Sam Rottenberg, "You know what

1 MISSRY

2 we're looking for."

3 A. Um-hum.

4 Q. What was Vanderbilt looking for?

5 MR. KOH: Objection.

6 THE WITNESS: Someone that Tom
7 would choose to do the best possible
8 job for both parties.

9 BY MR. WALSH:

10 Q. And nothing more?

11 A. No. Based upon the process, it
12 didn't matter to Vanderbilt. Sam had his
13 appraisal. We didn't think that -- I
14 don't know that we had anyone else's
15 appraisal at that point in time. It was
16 very early in the process. We had a sense
17 of what our valuation was so we just
18 wanted to move the process along. It was
19 a very strong sense of frustration
20 because, you know, the folks at
21 McDonald's, I'm sure they have a million
22 things to do, were not really that focused
23 on this particular issue.

24 Q. So do you recall having any
25 discussions with Tom or being a part of

1 MISSRY

2 any discussions with Tom where he was told
3 it would be helpful to have an appraiser
4 appointed who would agree with a high
5 valuation?

6 A. I have no recollection of that.

7 Q. If we could mark P38 or pull P38,
8 I'm sorry. And it's an e-mail chain from
9 May 6, 2019 between you, Tom Tener and
10 Morris Missry and it starts with an e-mail
11 from Tom Tener saying that he had not
12 spoken with Sharon yet but he was
13 considering including Marc Nakleh of
14 Cushman & Wakefield on his list. And you
15 ask, "Why him?" And he responded, "I
16 reviewed one of his appraisal reports that
17 he did for Brian Corcoran that detailed
18 numerous ground rent percentages relative
19 to land value. I will remind him of this
20 data that he has available in his files.
21 Some of this data is noted in my report
22 and is supportive of a high percentage in
23 the estimation of FMR."

24 So is this what Vanderbilt was
25 looking for in an appraiser?

1 MISSRY

2 A. I think that any appraiser would
3 want somebody that would support its
4 conclusions. So I don't view that e-mail
5 as anything but a good appraiser doing his
6 job trying to find folks that would
7 support the conclusions that he reached.
8 Obviously Sharon had respect for Marc as
9 well because she chose him out of four or
10 five different people and I would assume
11 that whatever Tom reviewed, Sharon could
12 also have reviewed.

13 Q. If we could please pull up P74.

14 A. Okay.

15 Q. If you could go down to the
16 second page on the bottom e-mail, it's an
17 e-mail from Tom Tener to you, April 25,
18 2019. It's to you and Sam Rottenberg
19 actually.

20 A. Okay.

21 Q. And Tom shares with you that --
22 this is the last line, last two lines on
23 that page, she, Sharon, seems to think
24 that we will meet with a third appraiser
25 and try to convince her that our FMVS are

1 MISSRY

2 correct prior to the third appraiser
3 authoring our report.

4 What was your view on how the
5 three appraisers should work together?

6 MR. SCHWARTZ: Objection.

7 THE WITNESS: My view was and is
8 that the first two appraisers -- my
9 view is to interpret the lease
10 correctly so the first two appraisers
11 are supposed to -- the first two
12 appraisers are supposed to do their
13 work, issue their letter of opinion of
14 value or letters of opinion of
15 values -- value. Once they do their
16 work and issue their letters, if
17 there's that disparity of 15 percent
18 or more, the parties are supposed to
19 appoint a third appraiser and that
20 third appraiser is supposed to issue
21 his or her letter of opinion of value
22 and then I guess they can discuss it
23 if they'd like to and then you take
24 the average of the three.

25 ///

1 MISSRY

2 BY MR. WALSH:

3 Q. And if you look back at that
4 e-mail that we just read, the very next
5 line on the next page, Tom says, "What is
6 your take on the procedure outlined in the
7 option rent addendum?"

8 A. Um-hum.

9 Q. Do you recall Tom asking for your
10 view?

11 A. I'm sorry?

12 Q. Do you recall Tom asking for your
13 view on the process?

14 A. Yeah, I think he did.

15 Q. Okay. And then it looks like you
16 suggested call with you and Sam
17 Rottenberg; right?

18 A. Okay.

19 Q. And it looks like if you scroll
20 through the e-mails, that you had that
21 call with him on April 30th.

22 Do you see that?

23 A. I do.

24 Q. So the three of you spoke on
25 April 30th and did you communicate to Tom

1 MISSRY

2 Tener on that call what you just shared
3 with me?

4 A. I'm sure I did at some point. I
5 don't know what happened on that
6 particular call.

7 Q. Now, your view on what the lease
8 requires, did you consult with anyone else
9 in arriving at that conclusion or was that
10 your conclusion alone?

11 A. That was my conclusion. I think
12 it was Tom's conclusion and probably Sam's
13 conclusion as well.

14 Q. Was this the first time you had a
15 discussion with Tom Tener about how the
16 three appraisers would work together?

17 A. I have no idea.

18 Q. And you believe that this was
19 also Tom Tener's view of what the lease
20 language required?

21 A. Yes.

22 Q. If we could please pull up P77.
23 This is an e-mail chain from May of 2019
24 between Morris Missry, Tom Tener, Sam
25 Rottenberg and Tom Li.

1 MISSRY

2 A. Yes.

3 Q. So on May 14, 2019, Tom Tener
4 e-mailed you and said, "Morris: If the
5 hope is to avoid litigation and delay in
6 the rent reset, I might suggest that you
7 propose having the three appraisers review
8 the directions and see if two of us can
9 agree. What do you think?" And you
10 responded about 15 minutes later, "The
11 lease provision is clear. I am talking to
12 them and will let you know what happens.
13 Thank you."

14 So you rejected Tom Tener's
15 suggestion to have the three appraisers
16 try to figure this issue out; right?

17 MR. KOH: Objection.

18 MR. SCHWARTZ: Objection.

19 THE WITNESS: I was interpreting
20 the lease provision. To me it was and
21 is crystal clear as to the procedure.
22 I guess Tom was reacting to my comment
23 about trying to avoid litigation and
24 getting things done quickly so he was
25 trying to be conciliatory, but that

1 MISSRY

2 unfortunately wasn't proper procedure
3 and we wanted to stick with the proper
4 procedure.

5 BY MR. WALSH:

6 Q. So why don't we pull up the
7 option rent addendum. It's P16. It is
8 already in your list.

9 A. Okay.

10 Q. So in your view, where does it
11 clearly state that the three appraisers
12 cannot have any discussions with each
13 other?

14 MR. SCHWARTZ: Objection. You
15 can answer.

16 MR. KOH: Same objection. Go
17 ahead.

18 THE WITNESS: I don't think I
19 said that, did I?

20 BY MR. WALSH:

21 Q. So what is your view? What is
22 your view of what the lease requires?

23 A. I just testified to it.

24 Q. If you could explain it again
25 because my understanding is you were

1 MISSRY

2 saying that the three appraisers could not
3 have any communications with each other.

4 A. I never said that.

5 Q. So can you please explain what
6 your view of it is?

7 A. If you take a look at the option
8 rent addendum, the last paragraph, let's
9 read it together. We'll start with the
10 second sentence. If the two appraisals
11 differ by more than 15 percent, which they
12 did, then the two appraisers shall appoint
13 a third appraiser chosen from a list of
14 three appraisers designated by the
15 national headquarters of American
16 Institute of Real Estate Appraisers, which
17 wasn't done, or if no longer in existence
18 a similar success organization. They
19 chose Marc Nakleh because they both I
20 guess agreed that he was the proper guy.
21 The three appraisers so appointed shall
22 then within 20 days of the date of the
23 third appraiser estimate by means of a
24 letter of opinion about the fair market
25 value. The decisions of the appraisers or

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majority of them shall be binding upon the parties. If the appraisers cannot agree to a fair market value, it shall be determined by adding all three estimates and dividing the total by three estimates, by number three. So by means of a letter opinion of value, that's the procedure and once each party -- and we can continue to read other provisions that bolster that process. Once that appraiser, the third appraiser issues its opinion of value, then you compare the three. If two of them match, that's the rent, if they don't, you divide by three.

Q. So is it your view that it's a purely sort of mechanical process of just looking at the three valuations and if they don't match to the penny, you need an averaging?

A. Yes, that's what it says.

Q. So it's your view that the appraisers cannot have any discussions to see if they can agree on a valuation?

MR. KOH: Objection. Go ahead

1 MISSRY

2 and answer.

3 MR. SCHWARTZ: Objection.

4 THE WITNESS: Again, you're
5 putting words in my mouth. I didn't
6 say they can't speak. What I said was
7 they have to issue their letters of
8 opinion of value first.

9 BY MR. WALSH:

10 Q. And unless they match to the
11 penny, they have to be averaged, is that
12 your view?

13 A. Well, let's --

14 MR. SCHWARTZ: Objection. You
15 can answer.

16 MR. KOH: Same objection.

17 THE WITNESS: If the appraisers
18 or a majority of them cannot agree on
19 fair market value, so to me that means
20 they can't agree on what the precise
21 number is.

22 BY MR. WALSH:

23 Q. I'm asking you in determining
24 whether they can agree --

25 A. Yeah.

1 MISSRY

2 Q. -- are they allowed to have
3 discussions to see if they can agree or is
4 it just that process of looking at the
5 valuations that they came up with and if
6 they don't match, then averaging them?

7 MR. SCHWARTZ: Objection. You
8 can answer.

9 THE WITNESS: I answered it but
10 I'll repeat myself. The third
11 appraiser has to estimate by means of
12 a letter of opinion of value the fair
13 market value.

14 BY MR. WALSH:

15 Q. That wasn't my question. What
16 I'm trying to understand is --

17 A. I don't see anything in here --

18 Q. Let me ask my question. Is it
19 your opinion that the appraisers just work
20 independently and unless their valuations
21 match to the penny, they are averaged?

22 A. Yeah.

23 MR. KOH: Objection. Go ahead
24 and answer.

25 THE WITNESS: The answer is yes,

1 MISSRY

2 I think the process tries to or the
3 provision of the lease tries to
4 eliminate any funny business by making
5 the three appraisers do their work
6 independently of each other, not
7 having one appraiser try to influence
8 the other and sort of skew that
9 process. So I think that the process
10 set forth in the option term addendum
11 is inherently fair and impartial so
12 the answer is yes.

13 BY MR. WALSH:

14 Q. If you could please turn back to
15 P38 which was an e-mail between -- e-mail
16 exchange between you and Tom Tener and Sam
17 Rottenberg about Marc Nakleh.

18 A. Okay.

19 Q. Tom wrote to you, "I will remind
20 him of this data that he has available in
21 his files. Some of this data is noted in
22 my report and is supportive of a high
23 percentage in the estimation of FMR."

24 Did you ever tell Tom that it
25 would be inappropriate for him to speak

1 MISSRY

2 with Marc and remind him of this data?

3 A. I'm not sure that Tom spoke to
4 Marc about his data.

5 Q. That wasn't my question. Did you
6 ever tell Tom it would be inappropriate
7 for him to do that?

8 A. What I would have told Tom as I
9 told Mike Meyer is that nobody, whether
10 the party or any appraiser, can skew or
11 try to talk to a third appraiser to tell
12 him what his estimate of value is and
13 cannot do anything improperly.

14 Q. Did you tell him that?

15 A. I told everybody that.

16 Q. When did you tell him that?

17 A. I don't recall.

18 Q. Okay, so how are you so certain
19 that you told him that?

20 A. Because I do things ethically and
21 you remember Mike Meyer making -- if you
22 take a look at his drafts, he wanted the
23 folks to talk. He wanted them I believe
24 to share -- at least in conversations he
25 told me that he wanted the appraisers to

1 MISSRY

2 share their thoughts. I thought it was
3 inappropriate given the language of the
4 lease.

5 Q. Would you have told Tom that in
6 writing in response to his e-mail?

7 A. I don't know if it was in writing
8 or if it was verbally. I'm not sure. The
9 process was very, very important to me
10 because I thought that the provision
11 wasn't so great and I wanted to abide by
12 the strict terms of it.

13 MR. WALSH: If we could please
14 mark VA 000778.

15 (Exhibit P100, document Bates
16 labeled VA 000778, marked for
17 identification.)

18 BY MR. WALSH:

19 Q. That will be P100.

20 A. Let me know when it shows up,
21 please.

22 Q. It's there.

23 A. Thank you. P100, here it is.

24 Q. So on September 24, 2019, Tom
25 Tener sent you and Sam Rottenberg an

MISSRY

e-mail saying that Sharon had reached out to him to set up a meeting to discuss Tom's value conclusions and he suggested that you and Mike Meyer of McDonald's reach out to Marc Nakleh and get his proposal for his role as the third appraiser in this proceeding. Continuing down it says we will also likely want to have a preliminary meeting with Marc and to provide him with each appraiser's understanding of the appraisal assignment as well as our comparables in support of our conclusion.

What was your reaction to Tom's suggestion?

A. I don't know. I would have to see the e-mail.

Q. I'm just asking you, do you recall what your reaction was?

A. If you show me the e-mail, maybe I would recall. I don't recall.

Q. I'm not suggesting there's an e-mail. I'm asking what your reaction is.

A. If I can see an e-mail I might

1 MISSRY

2 recall. I don't recall what my reaction
3 was.

4 Q. Okay. But what Tom was proposing
5 was inconsistent with what you believe the
6 process required; right?

7 A. Yes.

8 MR. SCHWARTZ: Objection.

9 MR. KOH: Same objection.

10 BY MR. WALSH:

11 Q. Now do you know what position
12 Vanderbilt is currently taking about how
13 the three appraisers should work together?

14 A. I have no idea.

15 Q. Have you been involved in any
16 discussions with Vanderbilt about a change
17 in its position after this litigation was
18 filed?

19 MR. SCHWARTZ: Objection.

20 THE WITNESS: I haven't been in
21 touch with Vanderbilt to discuss this
22 process since McDonald's sued them.

23 MR. WALSH: If you could please
24 mark 2021.05.27 and you can see the
25 rest, that will be Exhibit P101.

1 MISSRY

2 These is Vanderbilt's amended answers
3 and objections to plaintiff's first
4 set of interrogatories.

5 (Exhibit P101, amended answers
6 and objections, marked for
7 identification.)

8 THE WITNESS: Okay.

9 BY MR. WALSH:

10 Q. Okay, if you could -- so these --
11 if you could flip to the second to last
12 page, it's interrogatory number 20. And
13 these are Vanderbilt's responses to our
14 interrogatories -- McDonald's
15 interrogatory.

16 The procedure that Vanderbilt is
17 suggesting in this response is different
18 than the procedure that you believed
19 should be followed and that we discussed
20 earlier; right?

21 A. I think if you read this response
22 carefully, it says the three appraisers
23 would have no obligation to hear testimony
24 or take any other evidence beyond each
25 party's already prepared exchange

1 MISSRY

2 appraisals. I was reading from response
3 to interrogatory number 20, the second
4 sentence.

5 Q. Where it says the three
6 appraisers would confer, you did not
7 believe the appraisers should have any
8 discussions; right?

9 MR. SCHWARTZ: Objection.

10 MR. KOH: Objection.

11 THE WITNESS: No, I didn't say
12 that. You keep mischaracterizing what
13 I said. What I said was there is no
14 obligation to have any discussions and
15 at the very least the obligation is
16 for each of the appraisers to complete
17 and issue their letter of opinion of
18 value. They can confer all they want
19 afterwards but that's the obligation
20 under the lease. Maybe there's a
21 Court of Appeals case that says that
22 they can talk even though it doesn't
23 say it in the lease.

24 BY MR. WALSH:

25 Q. Are you aware of any such

1 MISSRY

2 decision?

3 A. I'm not.

4 Q. So on November 1, 2019, I sent
5 you a letter explaining the reasons why
6 McDonald's was concerned by Vanderbilt's
7 failure to cooperate in the fair market
8 rent valuation process. Do you recall
9 that letter?

10 MR. SCHWARTZ: Objection.

11 THE WITNESS: I do. I found it
12 comical.

13 BY MR. WALSH:

14 Q. And your reaction to that letter
15 was to tell Vanderbilt that it should sue
16 McDonald's; right?

17 A. I don't recall my reaction other
18 than laughing at the notion that
19 Vanderbilt was not cooperative when they
20 waited nine months, 10 months for
21 McDonald's to do anything.

22 MR. WALSH: If we could mark
23 VA 034315.

24 (Exhibit P102, document Bates
25 labeled VA 034315, marked for

1 MISSRY

2 identification.)

3 BY MR. WALSH:

4 Q. And that will be Exhibit P102.

5 Mr. Missry, what are you looking at right
6 now?

7 A. I was looking at my text.

8 Q. But we're in the middle of a
9 deposition.

10 A. I'm waiting for you to tell
11 me that the exhibit --

12 Q. I asked you before, please, you
13 should not be --

14 A. Not a problem.

15 Q. -- during this deposition?

16 A. Not a problem.

17 Q. Did that text relate to this
18 deposition?

19 A. No, it relates to my gardener, if
20 you want to see it. What exhibit do you
21 want me to look at?

22 Q. Exhibit P102.

23 MR. KOH: There's no 102 but
24 there's two 101s.

25 MR. WALSH: I see an Exhibit P102

1 MISSRY

2 on my screen.

3 MR. KOH: Now I have it.

4 THE WITNESS: Okay.

5 BY MR. WALSH:

6 Q. So this is an e-mail that you
7 sent to Sam Rottenberg and Tom Tener and
8 Dani Schwartz on November 1, 2019 in
9 response -- actually forwarding the letter
10 that I had sent to you and you wrote, they
11 fired the first shot. We should -- we
12 need to sue them.

13 A. Yeah.

14 Q. What type of lawsuit did you
15 envision?

16 A. I don't know.

17 MR. KOH: Objection.

18 BY MR. WALSH:

19 Q. What did you believe your claim
20 would be?

21 MR. KOH: Objection.

22 THE WITNESS: I don't know.

23 BY MR. WALSH:

24 Q. Now, you testified earlier that
25 there was nothing in this option rent

1 MISSRY

2 addendum that provided for any litigation,
3 yet you're saying to Vanderbilt and to Tom
4 Tener we need to sue them. I'm just
5 trying to understand what you believed
6 that lawsuit would look like.

7 A. I believe McDonald's acted in bad
8 faith throughout the process. I believe
9 they delayed Vanderbilt in determining the
10 fair market value rent. I believe that
11 they wouldn't agree to retain Marc Nakleh
12 to be the third appraiser because they
13 were intimidated, afraid, didn't want to
14 accept Tom Tener's conclusions and no
15 matter what Marc Nakleh said, it would be
16 a disaster for McDonald's. So they acted
17 in total bad faith. That's what I meant.

18 Q. And you believed that a court
19 should decide those issues; right?

20 A. I believe that a court should
21 probably require the retention of Marc
22 Nakleh so that he could do the comps.

23 Q. So that was the nature of your
24 proposed lawsuit?

25 MR. KOH: Objection.

1 MISSRY

2 MR. SCHWARTZ: Objection.

3 THE WITNESS: I don't recall the
4 nature of my proposed lawsuit other
5 than I was thinking along those lines
6 at the time.

7 BY MR. WALSH:

8 Q. Do you remember how Tom Tener or
9 Vanderbilt reacted to your suggestion?

10 MR. KOH: Objection. Go ahead.

11 THE WITNESS: No.

12 BY MR. WALSH:

13 Q. Did you have any discussions with
14 Tom Tener about your proposed lawsuit?

15 MR. SCHWARTZ: Objection.

16 THE WITNESS: I didn't have a
17 proposed lawsuit.

18 BY MR. WALSH:

19 Q. You're saying --

20 A. I told my client -- let me finish
21 the answer. I told my client that he
22 should sue McDonald's because McDonald's
23 was acting in bad faith in delaying the
24 determination of what the rent should be.

25 Q. So my question is did you have

1 MISSRY

2 any discussions with Tom Tener about that?

3 A. I don't recall having discussion
4 with Tom Tener about litigation.

5 Q. Did you or your firm -- let me
6 say, when did you begin collecting
7 documents for document production purposes
8 in this litigation?

9 A. Whenever Howard asked us to.

10 Q. Do you recall when that was?

11 A. No.

12 Q. Whose documents were collected?

13 A. Sorry?

14 Q. Whose documents were collected?

15 A. What does that mean?

16 Q. Who did you collect documents
17 from?

18 A. From my e-mails, from, you know,
19 my files.

20 Q. Anyone else?

21 A. I don't think anybody else worked
22 on this other than me.

23 Q. Well, Dani Schwartz was just
24 copied on the e-mail that we looked at a
25 moment ago. Was he working on this

1 MISSRY

2 matter?

3 A. Dani may have given me some
4 guidance on a couple things. I'm not
5 sure.

6 Q. Were those documents produced?

7 MR. SCHWARTZ: Objection. I just
8 want to note on the record that
9 there's been a pattern throughout the
10 day of stating as a premise of the
11 question things that the witness never
12 said or that are not in evidence and
13 not in the record, and in fact, belied
14 by the record. So I would just ask
15 that you to take more care in
16 fashioning the questions instead of
17 putting words in the witness's mouth.

18 MR. WALSH: I'll continue to ask
19 my questions and you can continue to
20 object if you disagree.

21 BY MR. WALSH:

22 Q. So my question before was: Was
23 Dani Schwartz working on this matter?

24 A. He may have given me some
25 guidance on a few questions I had.

1 MISSRY

2 Q. So were those documents produced
3 to Vanderbilt?

4 MR. KOH: Objection. You're
5 assuming such documents exist when
6 there's no evidence that they do.

7 MR. SCHWARTZ: Same objection as
8 to the prior objection that I made.

9 BY MR. WALSH:

10 Q. What did you do to determine if
11 Dani Schwartz or anybody else in your firm
12 had responsive documents?

13 A. I don't recall.

14 Q. Did you do anything?

15 A. I'm assuming we asked around if
16 anybody had any documents on this matter.
17 That's what we typically do in a
18 litigation.

19 Q. Would that have been done in
20 writing?

21 A. I don't recall.

22 Q. How did you determine which
23 documents would be provided to Vanderbilt?

24 A. To Vanderbilt or to Vanderbilt's
25 attorney?

1 MISSRY

2 Q. Either/or.

3 A. I think we basically provided
4 everything we had.

5 Q. How did you determine what
6 everything you had was?

7 A. We looked.

8 Q. How did you look?

9 A. With a fine toothed comb and a
10 feather. We looked on our system.

11 Q. So did you --

12 A. In our file.

13 Q. What I'm trying to understand is
14 how did you look, what did you do, did you
15 run search terms? I'm trying to just
16 figure out, it's not a hard question, what
17 did you do to determine what potentially
18 responsive documents you had?

19 A. We looked at various search
20 terms, e-mails by and between parties.

21 Q. What search terms did you use?

22 A. I don't know.

23 Q. Were those search terms retained?

24 A. I don't recall.

25 Q. And who did that process?

1 MISSRY

2 A. I don't recall.

3 Q. What instructions did you get
4 from Vanderbilt or Vanderbilt's counsel
5 about how to determine potentially
6 responsive documents?

7 A. I don't recall.

8 Q. Did Vanderbilt's counsel or
9 Vanderbilt send you copies of McDonald's
10 discovery demands?

11 A. I don't recall.

12 Q. How did you -- what file did you
13 locate your handwritten notes from the
14 June 19, 2019 meeting?

15 A. I don't recall.

16 Q. Are those the only handwritten
17 notes that you have from your
18 representation of Vanderbilt in this
19 matter?

20 A. I assume so.

21 Q. What did you do to check?

22 A. We checked our files as I said
23 three times.

24 Q. Are you certain that all
25 handwritten notes from your files have

1 MISSRY

2 been produced?

3 A. I think so but I don't recall
4 what else was produced. It was awhile
5 ago.

6 Q. Would you be surprised if those
7 were the only notes that were provided in
8 response to McDonald's document demands?

9 A. I really don't know. We try to
10 be as thorough as possible and we provided
11 everything that we were requested to
12 provide.

13 Q. I'm trying to understand, where
14 did you find those notes, were they in a
15 hard file?

16 A. Probably but I don't know.

17 Q. What else was in that file?

18 A. Found it a long time ago, I don't
19 recall.

20 Q. If we needed you to, would you be
21 able to locate that same file and
22 determine whether there's anything else
23 that's responsive?

24 A. Would we be able to do what?

25 Q. Would you be able to find that

1 MISSRY

2 file and determine if there's any other
3 responsive documents?

4 A. I think we've provided everything
5 to Meister Seelig.

6 Q. Okay. Did you withhold anything
7 as privileged or nonresponsive?

8 A. You'd have to ask Mr. Koh and
9 Mr. Schwartz. I don't know.

10 Q. Well, I'm asking you.

11 A. I don't know. I have no idea. I
12 provided everything that was asked of us.

13 Q. Okay. And what was asked of you?

14 A. To provide all e-mails,
15 documents, et cetera, on this matter.

16 Q. And you believe you did that?

17 A. I believe we did.

18 MR. WALSH: Okay, I think I'm
19 just about done. If we could just
20 take a short two-minute break and come
21 back and hopefully wrap up.

22 THE VIDEOGRAPHER: Off the record
23 at 3:26 p.m.

24 (Recess taken from 3:26 p.m. to
25 3:29 p.m.)

1 MISSRY

2 THE VIDEOGRAPHER: Back on the
3 record 3:29 p.m. You may proceed.

4 MR. WALSH: Mr. Missry, thank you
5 for your time today. I don't have any
6 further questions.

7 THE WITNESS: Thank you very
8 much.

9 MR. KOH: Mr. Missry, if you
10 could just indulge me for a very short
11 question or two, I'd like you to pull
12 up what was marked as I believe P59.
13 It should be the underlying lease
14 here.

15 MR. WALSH: 69?

16 MR. KOH: 69. I'm sorry, 69.
17 Excuse me.

18 THE WITNESS: Okay.

19 EXAMINATION

20 BY MR. KOH:

21 Q. I'd like you to turn to paragraph
22 number 13 on that lease and when you have
23 it, just read it to yourself. Let me know
24 when you're ready and then I will ask you
25 a question or two about that.

1 MISSRY

2 A. Paragraph 13?

3 Q. It's article 13. It's on the
4 page ending 334. It begins option to
5 extend.

6 A. Sure, just give me a second here.
7 (Witness perusing document.)

8 Yes.

9 Q. Earlier in the deposition you
10 testified that there was one 20-year
11 option term. Does having seen paragraph
12 or article 13 affect your answer in any
13 way?

14 A. No, it's an automatic extension
15 for four successive periods of five years
16 each which means it's a 20-year extension.

17 MR. KOH: No further questions.

18 MR. SCHWARTZ: None here.

19 MR. WALSH: None here.

20 MR. KOH: Thank you very much,
21 Mr. Missry.

22 THE VIDEOGRAPHER: We're going
23 off the record at 3:31 p.m. This
24 concludes today's testimony given by
25 Morris Missry. There are four media

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units. They will be retained by
Veritext.

(Time noted: 3:31 p.m.)

MORRIS MISSRY

Subscribed and sworn to before me
this ___ day of _____, 20__.

Notary Public

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C E R T I F I C A T E

STATE OF NEW YORK)
 : ss.
COUNTY OF NASSAU)

I, CATHI IRISH, a Registered
Professional Reporter, Certified Realtime
Reporter, and Notary Public within and for
the State of New York, do hereby certify:

That MORRIS MISSRY, the witness whose
deposition is hereinbefore set forth, was
duly sworn by me and that such deposition
is a true record of the testimony given by
the witness.

I further certify that I am not
related to any of the parties to this
action by blood or marriage, and that I am
in no way interested in the outcome of
this matter.

IN WITNESS WHEREOF, I have hereunto
set my hand this 1st day of October, 2021.



CATHI IRISH, RPR, CRR, CLVS

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----- I N D E X -----

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	MR. KOH	215

----- EXHIBITS -----

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VA 012072		
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Exhibit P94,	document Bates labeled	81
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Exhibit P98,	document Bates labeled	174
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Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

DISCLAIMER: THE FOREGOING FEDERAL PROCEDURE RULES ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY.

THE ABOVE RULES ARE CURRENT AS OF APRIL 1, 2019. PLEASE REFER TO THE APPLICABLE FEDERAL RULES OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.

VERITEXT LEGAL SOLUTIONS
COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

Veritext Legal Solutions is committed to maintaining the confidentiality of client and witness information, in accordance with the regulations promulgated under the Health Insurance Portability and Accountability Act (HIPAA), as amended with respect to protected health information and the Gramm-Leach-Bliley Act, as amended, with respect to Personally Identifiable Information (PII). Physical transcripts and exhibits are managed under strict facility and personnel access controls. Electronic files of documents are stored in encrypted form and are transmitted in an encrypted fashion to authenticated parties who are permitted to access the material. Our data is hosted in a Tier 4 SSAE 16 certified facility.

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